THE

LEGAL RIGHTS,

LIABILITIES AND DUTIES OF WOMEN;

WITH AN

INTRODUCTORY HISTORY

OF THEIR

LEGAL CONDITION IN THE HEBREW, ROMAN AND FEUDAL CIVIL SYSTEMS.

INCLUDING

THE LAW OF MARRIAGE AND DIVORCE, THE SOCIAL RELATIONS OF HUSBAND AND WIFE, PARENT AND CHILD, OF GUARDIAN AND WARD, AND OF EMPLOYER AND EMPLOYED.

BY

EDWARD D. MANSFIELD, A. M.

Late Professor of History in Cincinnati College, Author of the Political Grammar, and Corresponding Member of the National Institute.

SALEM:

PUBLISHED BY JOHN P. JEWETT & CO.

CINCINNATI: WILLIAM H. MOORE & CO.

1845.

ANDOVER:
Printed by Allen, Morrill and Wardwell.

DEDICATION.

TO MRS. ELIZABETH MANSFIELD.

To you of right, both of nature and of culture, these pages belong. You have been, at once, mother to the author, teacher to the pupil, and suggester of the work. You have all the rights of property, to either book or writer, which one who plants and cultivates a tree, has to the fruit upon its branches. The tree may have grown, in spite of your labor, crooked in its trunk, or the fruit may be deficient. But the fault is not yours. You have watered its roots and pruned its limbs, and if it produce anything useful or valuable, the praise and the property are yours.

To you, then, I dedicate this little work, hoping that it may come, in some degree, up to your wishes, and tend in some small measure, towards those useful results, and that high religious and intellectual education, which you desire for the female sex.

Your affectionate son,

EDWARD D. MANSFIELD.

Cincinnati, Aug. 4, 1845.

PREFACE.

THE idea of the following work was suggested to me by ladies of distinguished intelligence and worth. So far as regards the *plan*, then, I may fairly claim to hold the *sex* responsible for its success. Not so, however, in respect to its very imperfect execution. The plan embraced more than could be brought within the limits of this volume; and it embraced a more suggestive and even a more practical form. It was intended to do, not only what has been done, but to have, also, some reflections on proposed amendments to existing laws, and some of the practical forms of business. The former, I have been obliged to limit to brief observations, scattered throughout the treatise, and the latter to omit altogether.

There is room, however, on this subject, for another volume, and should this find favor with my intelligent countrywomen, it is intended to produce another, which shall be a sort of guide for them, in the every day business of life.

The work as now published, consists of four parts. The first may be called, a History of the Civil Condition of Women. The second, is an Account of her Civil Rights, as a Citizen of the Republic. The third, gives the general principles of the Laws of Property, common to all citizens. The fourth contains the Rights, Liabilities and Duties of Women in the Domestic Relations. Of course, these subjects are briefly treated. But it is believed, that this little book has the merit of stating all the principles of law on these subjects, at all important for women to know; of stating them in lan-

guage so clear and plain, as to be easily understood; and of thus communicating to intelligent women, a mass of legal information concerning their persons, property and happiness, which they could not find in any one volume; nor find at all, without resort to the expensive and ponderous volumes of a law library.

If this has been in a tolerable degree accomplished, the end has been attained for which the book was written. It may then be committed safely to the hands of those who are expected to be its readers, and whose kind consideration is asked not only for itself, but in behalf of the female sex, most of whom have heretofore been considered foreign to those grave and important studies, which have so largely occupied the serious attention of men.

Rights, and the knowledge of rights are no longer hidden from the inquiries of the masses of men; and why should they be from women? Though the practical details of business in the law are numerous, and require the attention of a separate profession, yet the *principles*, those which the citizen should understand, are plain and simple. They may be read, when clothed in popular language, as easily as a volume of history, and if a little pains were taken to illustrate them, they would be nearly as entertaining.

This volume is, as it regards women, an experiment, and I leave it with them to say how far such a plan, intended at least for their benefit, ought to succeed.

E. D. M.

CONTENTS.

INTRODUCTION.

SECTION I.

SECTION II.

SECTION III.

SECTION IV.

CHAPTER I.

LAW GENERAL.

CHAPTER II.

LAWS COMMON TO WOMEN AND MEN.

SECTION I.

SECTION II.

SECTION III.

SECTION IV.

SECTION V.

SECTION VI.

SECTION VII.

SECTION VIII.

SECTION IX.

CHAPTER III.

THE LAW OF MARRIAGE AND DIVORCE.

SECTION I.

SECTION II.

CHAPTER IV.

RIGHTS, DUTIES AND LIABILITIES OF A WIFE.

SECTION I.

SECTION II.

SECTION III.

SECTION IV.

SECTION V.

SECTION VI.

SECTION VIII.

SECTION IX.

CHAPTER V.

THE LAW OF PARENT AND CHILD.

SECTION I.

SECTION II.

SECTION III.

SECTION IV.

SECTION V.

SECTION VI.

SECTION VII.

SECTION VIII.

SECTION IX.

CHAPTER VI.

LAW OF GUARDIAN AND WARD.

CHAPTER VII.

LAW OF EMPLOYER AND EMPLOYED.

SECTION I.

SECTION II.

INTRODUCTION.

SECTION I.

The History of Woman is the History of the Domestic and Moral Life of Mankind. It is the social development of the Internal Constitution of the Race; and it exhibits more justly and transparently the character of the original germ, than any of those external manifestations of society in Art, Literature, Commerce, and Nationality, which have heretofore formed the chief subjects of Historical Pictures. The reason for this fact is too plain to admit of any denial. As the child is nursed on the bosom of its mother,—so on the character of woman the internal character of the race is founded, and shaped into being.

It is only very recently, that in the progress of Agricultural Chemistry, it has been discovered that each particular plant drew from the earth a particular quality, so that where that quality was wanting, that particular plant could not grow, although another would quickly spring up, and thrive. It is in the quality of the soil then, that the plant finds not merely its life, and nutriment, but those special elements which give it individuality in sight, and use. Thus wheat will grow

where maize will not, and the green pine extends over miles of surface where neither the oak nor maple are found. The soil has food for one, but not for the other.

Again, it is found that, by the action of other causes, such as the changes of atmosphere, the decay of vegetation, the deposites of flowing water, the decomposition of mineral earths, or the remains of animals,—the soil itself in time changes its elementary character, and when the convulsions of nature, or the hand of man has destroyed one series of its productions, it is prepared by new elements to sustain a new, and very different growth of vegetation. The field over which fire has passed is often, in a very few years, seen to be grown up with a very different species of tree. The birch grows up where the oak has disappeared. Yet again, it is discovered that some portions of the earth always contains some species of nutriment, in which others are deficient. Thus, there is always *somewhere* the material necessary to sustain the life and growth of every plant. It is by the knowledge of these principles, that the wise cultivator now discovers, through analysis, what qualities of the soil necessary to produce the desired plants are wanting, and then endeavors to replace them, either by new combinations, or by fresh additions from other spots. Thus the barren soil is frequently made to bloom with nutritive harvests; even the hard rock is covered with a mould of verdure; and the dew drops of heaven which once fell only to be dried up, and evaporated on the hot

sand, now give life to some beautiful flower, or glisten on the blades of the waving grain.

This analogy between the elementary character of the earth, and the elementary character, capacities, and adaptation of woman is not hidden. She was created the soil, both physical and moral, on which the human race was, and is to be produced, and nurtured. It is absolutely certain, that as no stream can rise above its fountain, so the condition of humanity can never rise above that of woman, its original soil. On the contrary, it is no bold assertion to say, that in humanity, as a whole, the moral *alloy* is greater than it is, or can be in woman, its more refined and delicate element.

The question of intellectual supremacy between man and woman is, in this view, not at all material. For, to every one of the race (Adam alone excepted) she has been prior in being, and prior in moral influence. Nay, she was prior to Adam himself, and prior in subsequent ages to all the race, in the two most important and sublime acts in the drama of humanity on earth. She was prior in that fearful temptation, when the dark spirit of evil was permitted to prevail over the human soul, and the gates of Eden were closed against its fugitive and sorrowing inhabitants. When,

> The brandish'd sword of God before them blaz'd
>
> ——and they with wandering steps, and slow
> Through Eden took their solitary way.

She was prior again in the promised restoration, when the seed of the woman bruised the serpent's head,

and the angel host again appeared to re-open the gates of paradise, and return the fugitive man to the rights and the hopes of his heavenly inheritance. If the first of these priorities was a degradation, the second was an honor greater than any which it was possible for mankind again to enjoy. Nor was it an unmeaning or unintended honor in the plans of Providence. For the gates of Eden had not closed when, over thousands of years of labor, disaster, sin, and sorrow, the foreshadowed future was dimly seen in the annunciation, that through the woman the spirit of evil should be bruised, that these tears for sin should cease to flow, and these sorrows forever flee away.

The question of intellectual supremacy then, cannot be important; because to both man and woman is assigned, in the order of Providence, their proper parts in the development of that grand Moral Drama, whose Acts fill up all the course of time. Concede to man, if we please, all the power, all the external conquests, and all the glory of the outward world of society; and it must yet be admitted, that in her greater control of the domestic and moral life, woman has as wide a field of dominion, as efficient a power, and, if a less luminous glory, one at least as widely radiated through the universe, as any yet spread upon the leaves of human history.

To return to our analogy. Woman being the soil, upon which the human race is produced, and nurtured, has like the earth various elements of character, each fitted to support its own peculiar plants. Like the earth too, women, as well as human nature generally,

has *somewhere*, in some form, all the elements, capacities and attributes necessary to sustain and develop all the germs of moral and intellectual being; and yet far more the power to carry that growth beyond any finite limits. But when, or where in any age, nation or family have we seen these germs all developed? Everywhere, and at all times, the human harvest has been partial. Some elements of spiritual being have in a particular family or nation been so neglected, as to be apparently lost; some even when naturally exuberant have been so little cultured, that the resulting plants have grown wild, and ill-directed; and some have been so much attended to, that their peculiar fruit has overshadowed all the rest. Is this partial culture a *necessity* of either woman, or the race? In the Scripture descriptions of human development no such idea is countenanced. There we are described as beings of various talents; and these talents all to be put to profitable use. Every element of the spirit, each in turn, must be nurtured. The flowers of the intellect, and the graces of the heart must be nourished alike; the end in view, being the restoration of the shattered constitution of humanity to its original beauty, symmetry and excellence. Happily for the dignity and glory of the human spirit, as a part of the universal creation, this restoration is a predestined result. However much it may be delayed by the perverted action of individuals, yet the declarations of Scripture and the unanimous laws of our being point with equal force and clearness towards that glorious end.

Civilization—Its three Eras. Primitive Nations, what.

The history of woman, in her connection with the progress of mankind has been, we have said, a history of moral life. It presents us, when properly viewed, successive pictures of that life, like prophetic visions read backwards. Man has had no light which she has not, and he has had no promise of a power, or possession, into which she shall not equally come.

Prior to a statement of the legal condition of women in the United States, it will be necessary and instructive to make a brief survey of the laws relating to women, and their social bearing in the most remarkable previous periods of civilization. Here we may remark that there are three ends, with their attendant forms of human politics, which properly considered will embrace nearly all the *roots* of laws, arts and societies. The others are but modifications of these.

The first of these is the period of what may be called the Primitive Nations. By these are meant such nations as the Hebrews and the Egyptians, who evidently received their knowledge and historical existence from a common source and common period, immediately subsequent to the deluge. The common origin was the family of the patriarch Noah; and the period of their separate existence the time of Peleg—the fifth in descent from the common ancestor.[1] The separation into nations was made about one hundred and thirty years after the flood.[2] Eber, the father of Peleg, was considered the head of the Hebrew nation. Asshur was the head of the Assyrians.[3] It is not difficult to

[1] Gen. 10: 1. [2] Id. 11: 11—19. [3] Id. 10: 11.

trace other of the early nations to the same source. All these nations obviously had a common root, and form of the arts, and modes of society. It may also be affirmed that the paganism of that period had a common origin and a common philosophy. These nations we call PRIMITIVE, and their civilization is Primary.

The nations whose origin was at a much later period, and probably commenced at some obscure period of history by colonization from the primary nations, we call DERIVATIVE; because their knowledge and history are subsequent to those of the primary order, and philosophically considered are derived from them. The most remarkable of these are the classic nations of Greece and Rome. They lived in the great midland period of the world; and when we trace up their history, we find no other source than certain rude tribes, or at best, supposed colonies and emigrations from the East. When we look, however, to the origin of their knowledge, it is evident that their arts and laws have been derived, at least in their rough elements, from the primitive nations, especially from Egypt. Their intellectual energy was remarkable, and their progress in arts and letters brilliantly rapid. It was this energy and vivacity of intellect, which has made their history and literature what we term Classic.

The THIRD ORDER of civilization is CHRISTIANITY; for, however widely various may be the language, literature or laws of Christian nations, they have common traits of social and legal life, distinguishing them from both the other forms of civilization preceding them.

The one great and common inheritance of the moral law contained in the commandments, does indeed ally Christianity to the Hebrew form of primitive society; but in all things else, it is radically and effectually different from that. The great features of oriental manners and oriental morals are wanting in Christian society, wherever found. In this Christian society are indeed found very great modifications of laws; such for example, as the changes from the laws of the Hebrews at Jerusalem to those of the feudal ages, and from those of the feudal ages to those which prevail in the United States, than which there could scarcely be greater variance of forms and rules in any period, or among any nations of the world. Yet, at the bottom of all these changes, the principles of the moral law of the New Testament have prevailed, modified and governed the whole. We have reason to believe, from the growth of the scientific arts, the diffusion of knowledge, and the increased energy of social life, as well as the declarations of the holy writings, that this form and principle of society will prevail, improve and strengthen, till the final restoration of humanity to the attributes of a perfect estate.

In this division of historical periods we have omitted the Chinese and Hindoo forms; because, although belonging to our own period, they do not constitute a very distinct organization from that of the primitive pagan nations. Indeed, the origin of their knowledge, and their forms very probably go back to the same period.

Condition of Women in various nations.

Let us now examine briefly the civil and social condition of women in each of these historical periods, as manifested in the legal institutions of some one distinguished nation. For this purpose we select the Hebrew, the Roman, and the English feudal systems. It will enable us to compare the condition of women, at some of the most interesting points of view from which humanity can be observed by the student of history. This will be the more necessary, and instructive, because the main part of this work has for its object, a development of those laws which relate to the rights, liabilities and duties of women in the United States. In this review, it is *the legal standard* of their condition to which we refer. *Laws are the expression of the condition of society.* They are not, as some suppose, the dictates of our arbitrary will, whether that of an individual, or of the people. It must ever be remembered that laws arise from the condition of society, more than from the genius of a law-giver. Only those are obeyed, or endure, which are consistent with that condition. Hence, when we examine the laws regulating the condition of women, we refer to a very certain and accurate standard of their real social life and manners. Barbarism will show itself in barbarous laws, and the laws of the most refined civilization in the arts will not in morals rise above the true moral state of the people.

SECTION II.

THE CONDITION OF WOMEN IN THE HEBREW COMMONWEALTH.

We take the Hebrew system as (judged by the *moral*, which is the just standard) the highest example of civilization in the primitive ages. Whatever may have been the condition of women in the Hebrew system, it is certain, it was no better in any other nation or age belonging to that historical period. In estimating what that condition was, we must consider two things. First, what was the degree of religious illumination, which in that period God had granted to his people; because that degree of illumination has been different in different eras of the world. Next, we must look at the civil condition of women in the surrounding nations, and in fine, the character and amount of civilization then pervading the world. For the laws and usages of mankind have nowhere attained perfection, and all things are as yet to be compared by what has been attained, rather than by what is possible.

The revelations of light and knowledge to mankind have been by successive Dispensations.[1] If it were not so, there would have been no need of the Mosaic Law; much less of the Christian revelation; for, the divine information communicated to the patriarchs would have been sufficient for the world. Still more would the

[1] Bishop Law's Theory of Religion, 6th edition, pp. 42—45.

more complete code of Moses have been abundant knowledge of the moral law, without the sublime revelation of the New Testament, and the awful sanctions with which it was accompanied. It was precisely because the patriarchs, notwithstanding the direct and special visitations of divine messengers to instruct them, were yet very imperfectly informed in either moral or intellectual knowledge, that the subsequent revelation from Mount Sinai became necessary; and, it was because all these were insufficient, and imperfect, compared with the ultimate light destined for mankind, that the Christian dispensation was made, and that successive additions of light and knowledge have descended upon the human race during the eighteen centuries from the ascension of Christ. In one word, if one dispensation only had been necessary for the instruction and restoration of mankind, that one would have been perfect both in kind and quality. Because the divine Providence had determined on a succession of dispensations, the light given to the Hebrews was limited in amount and adapted in kind to the condition and improvement of the Hebrews, according to the degree of civilization then extant in the world. In the language of bishop Law, "Mankind are not, nor ever have been, capable of entering into the depths of knowledge at once; of receiving a whole system of natural or moral truths together; but must be let into them by degrees, and have them communicated by little and little, as they are able to bear it. In this manner does every art and science make its way into the world; and though now and

then an extraordinary genius may arise, and reach as it were some ages beyond that in which he lives; yet how very few of his contemporaries are able to follow him, or even understand what he delivers! The generality still go on step by step in gathering up, and digesting, some small portions of that vast stock of knowledge which he found at once; and are for a long time, in respect to him, but mere children. So that, notwithstanding a few such extraordinary instances, I think we may affirm in general, that from the beginning of the world, science, or all kinds of intellectual accomplishments, have been found to make very slow and pretty regular advances among the bulk of mankind; but that upon the whole, advancing they have been, and are." This is true of knowledge acquired, or rather developed from the elements of nature by the human intellect; and it is in the same manner true, in so far as succession is concerned, of religious truth. This has not indeed been developed by such slow processes, as it regards the particular dispensation; for, the advent of Christ, and its attendant revelations, was a sudden and incalculable illumination to mankind. But in regard to *succession*, the development of religious and moral truth has been in the same order. Each series of knowledge has increased the original stock, and brought the race nearer to the standard of moral truth, and the highest order of civilization.

This great principle of human development must be kept constantly in mind, in order that we need not mistake the nature of Hebrew society, nor expect from

the dispensation of early ages that which the light of Christianity alone could give.

The Hebrew system itself improved, in respect to its *legal condition*, from the days of Abraham to those of the last Prophets. Some of its customs descended from the primitive patriarchs; most of its laws were given through Moses, and some were changed in after ages. The body of those, however, which denote the state of Hebrew society, are found in the books of Exodus, Leviticus and Deuteronomy. They are those which were declared by an inspired prophet of the Lord; and, compared by any standard of morals, laws, or society extant among other nations, were far beyond what any human lawgiver had then discovered. The civilization of the entire world was then rude, and the marks of that comparative barbarism, as judged by the Christian standard, may be found even in the social state of the Hebrews. It is exhibited, in a most marked degree, in the condition of women, who were not exempt, even in the righteous families of patriarch fathers, from the hard and degrading laws of polygamy; and who, in respect to property and legal rights, were little removed from slaves. This, however, was the universal state of society at that time; and, with the exception of the few Christians who have let in some scattered rays of light on oriental manners, has been the moral and legal state of Asiatic nations through all ages of the world. In our later day, (approaching, as we may reasonably hope, the "fulness of time," when the dispensation of Christianity shall have made its complete progress through the world,)

the conquest of India, the removal of commercial interdiction from China, and the colonization of the isles of the Pacific, afford a prospect that the oriental usages and laws in the social state must give way to those of European origin. This may be a consummation nearer than is commonly supposed. The true state of women among the Hebrews should be studied, in order to know what was the highest order of human society in that long range of primitive ages, which intervened between the deluge and the advent of Christ.

This brings us to the second fact to be observed in the consideration of the Hebrew laws, and that is, the condition of the pagan nations surrounding the land of the Jews. That condition will bring the higher and more excellent society of the Hebrews into bolder relief. The Bible furnishes this contrast in many places, by pointing out the ignorance, the idolatry, the cruelty, the most degrading vices and corrupt conduct of the Asiatic nations. Profane history does the same, and illustrates, in most melancholy colors, the fact that the dark places of the earth were the habitations of cruelty. The president de Goguet, in his Origin of Laws, makes this statement of the condition of women in the primitive state of society.[1] "Women belonged to the man who seized them first. They afterwards became the property of any one who had the address to seduce, or the strength to carry them off. The children who sprang from this irregular intercourse scarce ever knew who were their fathers. They knew only their mothers, for

[1] De Goguet's Origin of Laws, Arts and Sciences, Vol. I. Bk. 1.

which reason they always bore their name. Besides, no person taking any care to bring them up, they were often exposed to perish." This account is the description of a state of society, but very little different from that, which prevailed in Sparta under the laws of Lycurgus. The Hebrews were, however, coeval with nations, whose civilization was far higher than these usages indicate, and whose fame has outlived a period of three thousand years. Yet, we shall see that with many of the elegances and refinements of modern life, they had risen scarcely a step in the moral principles of society. Of these nations, the Assyrians were one of the most remarkable. Of them in the early ages, the historian relates[1] this barbarous practice: "Every year they assembled in one place all the young girls who were marriageable. The public crier put them up to sale, one after another. The rich paid a high price for those whose figure seemed the most agreeable. The money which was received for these was bestowed as a portion with the more homely, whom nobody would have fancied. For after they had disposed of the most beautiful, the crier presented such as were less attracting, and asked, if any one would accept of such a one with such a sum. The sale proceeded by coming lower, and lower, and she was at last allotted to him who was willing to accept of her with the smallest portion. In this manner all the young women were provided with husbands. This very politic and ingenious method of fa-

[1] Goguet's Origin of Laws, Vol. I. Bk. 1. p. 44.

cilitating and promoting marriages, was also practised by several other nations."

The mode of distribution in this marriage scheme was certainly just; but the *principle* on which it was founded was most barbarous. This was, that women had nothing valuable but beauty. The inference, which we are compelled to draw is, that education among the Assyrians was absolutely nothing, and mind among women valued at nothing, and of course their condition was that of moral and personal slavery.

The Egyptians were the most polished and learned nation of antiquity, in whose laws and learning Moses himself was declared to be most deeply versed. They were that people, with whose usages the Hebrews were most familiar. In their laws, we shall see that women on the one hand held the highest rank, while on the other they were deeply sunk in the general moral corruption of the age.

So great was the deference to women among the Egyptians, that *the men promised, in their marriage contracts, to be obedient to their wives*,[1] thus exactly reversing the custom of the present day. They paid greater honor to their queens, than to their kings. They punished adultery severely, and it is said they allowed of but one wife.[2] But, on the other hand, it is said, that polygamy was allowed, and slavery certainly was.[3] But notwithstanding the great refinement of the Egyptians in regard to women, there are three facts, which

[1] Goguet's Origin of Laws, Vol. I. p. 52.

[2] Idem.

[3] Rollin, Vol. I. p. 8, Dearborn's edition.

counterbalanced all this, and made their condition really degraded. 1. The marriage of brothers and sisters was allowed; derived, as they said, from the happy marriage of Isis and Osiris. 2. The slavery of women was common. 3. The religion and worship of the country was such, as to nullify reason itself. This was the worship of beasts and birds and creeping things, the lowest of all the objects of worship which could enter the imaginations of the human mind.

Such were the morals and manners of the most refined Asiatic nations, in the days of the Hebrew primitive civilization. Of the Canaanites, whom they drove out, and of other neighboring nations, far less could be said on the score of either laws or refinement. We shall now proceed to state what was the *legal condition of women* under the Hebrew polity. This may be done more clearly by shaping it into distinct propositions. They are derived directly from the Mosaic law.

1. *Law of Husband and Wife.*

(1) The Hebrew system permitted polygamy (or the having of more wives than one), and the practice of many of the patriarchs and distinguished Hebrews corresponded with this permission and with the oriental manners.[1] There is, however, no encouragement to polygamy, in the Hebrew code.

(2) Wives were of different ranks. First, there were

[1] Refer to Exod. 21: 9, 10. Deut. 21: 15, 18. 1 Chron. 7: 4. 2 Chron. 24: 3. Take the examples of Abraham, Jacob, Solomon, Gideon, Elkanah and Caleb.

some wives unbought, who were voluntary wives, and as such exercised more authority, than other wives. Of such were Sarai and Rebecca. The second order were the regular but bought wives. Such were Rachel and Leah, who had less authority than was exercised in the family by such as Sarai and Rebecca. The third order were the concubines and handmaids. Such were Bilhah and Zilpah.[1]

(3) Wives were bought for money, or produce.[2] This was in consequence of the right of the father to sell his children, as slaves.

(4) The value of a bond-servant and a wife were nearly the same.[3]

(5) The wife carried to the husband no dowry. For as she was commonly bought, the husband paid a price for her, instead of her bringing anything to her husband. But, she did carry with her a sort of paraphernalia which was wholly personal to herself. This paraphernalia was slaves, or if that term be objected to, the bond-servants of the Hebrews. They were, however, in fact slaves.[4] Such were the damsels of Rebecca, when she left the house of her father Bethuel to become the wife of Isaac. And such were Bilhah, and Zilpah, who were given by Laban to his daughters.

(6) No marriage ceremonies were prescribed by Moses. He left the customs of the Hebrews in this respect as he found them. They had marriage cer-

[1] Michaelis's Commentaries, pp. 458, 459.

[2] Michaelis's Commentaries on the Laws of Moses, Vol. I. p. 444. Genesis 29: 3, 20. 31: 15. Hosea 3: 1, 2, 3.

[3] Michaelis's Comm. p. 452. [4] Genesis 24: 61. 29: 24, 29.

emonies, but they were not prescribed by the Mosaic law, and they were not made part of the duties of the priest.[1]

(7) Adultery was a crime legally confined to the *married woman*, and the man who was guilty with her. It did not relate to a man, except when the act was committed with a *married* woman.[2]

(8) The young wife was to be cherished and guarded in a peculiar manner, and for that purpose her husband was during the first year of his marriage allowed peculiar privileges.[3]

(9) The husband was deemed a criminal, and punished criminally, by the elders of the people, who cast reproach upon the virtue of his wife.[4]

(10) The wife was encouraged to domestic industry as a housewife, and the fruits of her labor were applied frequently to the support of the family.

(11) The husband could annul the vow, or oath of his wife.[5]

(12) The support of the wife, after the husband's death, was provided for. If she had children, their natural duty obliged them to maintain her. If she had not, the nearest relative of her deceased husband was obliged to marry her; or, if he declined doing so, to resign her to the more remote. This law was so peremptory, that he could not inherit the land of his deceased kinsman, without taking the widow with it.[6]

[1] Michaelis's Comm. pp. 474—476.
[2] Lev. 20: 10.
[3] Deut. 24: 5.
[4] Deut. 22: 13—22.
[5] Numb. 30: 6—8, 15.
[6] Ruth 4: 5, 6.

(13) The Hebrew Law regarded divorce, as wrong.[1] Yet—divorce was allowed on slight grounds.[2]

2. *The Law of Parent and Child.*

(14) Parents could sell their children, as slaves.[3]

(15) A father could revoke a daughter's vow or oath, but not a son's.[4]

(16) Daughters could not inherit. The daughters could inherit only when there were no sons; and that law was made at an advanced period of Hebrew history.[5]

3. *Law of Consanguinity.*

(17) Moses guarded the purity of families, by forbidding the marriage of near relatives,[6] and by the punishment of licentiousness.[7]

4. *Law of Prisoners.*

(18) It was allowable to take women captives in war, and make wives of them. Their only privilege was a month of mourning, to mourn the loss of friends by captivity.[8]

(19) The creditor could sell his debtor and his family for debt.[9]

Such is a summary of the main features of the legal and social condition of women under the He-

[1] Gen. 2: 24. [2] Deut. 24: 1—4. [3] Michaelis's Comm. Vol. I. p. 161.
[4] Numb. 30: 2—5. [5] Gen. 31: 14, 15. Numb. 27: 2, 3, 4, 7, 8.
[6] Lev. 20: 14, 17. 18: 6, 14. [7] Gen. 2: 24. [8] Deut. 21: 10—13.
[9] Lev. 25: 39. Isa. 50: 1.

brew Polity. Others might have been added to soften or strengthen the picture, but these are the leading characteristics of that system, in regard to women; and if they are hard, they are far milder than will be found pervading any other code of that early age. It is not difficult to see, that things were permitted, which are offensive to the Christian church at this day; and that the rank and position of women in society, as citizens and as human beings, were far inferior to that of a woman under any of the various political systems, which have originated with, or governed the manners of Christian nations. The fact that a young woman could be sold by her father, that she had no inheritance with her brothers in the estate of her family, that her pecuniary value was but little more than that of a slave, that she might be compelled to share with others the rights of a wife, and that even her oath might be absolved by her husband, prove with the force of demonstration, that however admirable and excellent were the great leading principles of the Hebrew Polity, women, as well as the church itself, were yet dwelling in the region of symbols and shadows. It gives peculiar point to the great principle already stated, that divine light has been vouchsafed to mankind in a series of dispensations, of which the last takes nothing from, but vastly increases the illumination of the first.

The discomforts and difficulties which attended the condition of women in the Hebrew state were the inseparable evils attendant upon all human nature in that period of the world. But, the checks upon those evils,

the guards thrown around domestic happiness, the inducements to purity of conduct, the great moral principles developed in the commandments, and the foreshadowed, though yet dim, prospect of a renovation and a restoration, were means of elevation, grounds of hope, and heaven-sent privileges which no heathen nation of ancient or modern times could possess, or even imagine. The beauty and excellency of the moral truth shining through the Hebrew civil code, belonged in the days of antiquity to that code alone, while the occasional spots and apparent evil on its surface were but small parts of that dark mass of barbarism, which made the solid substance of social life throughout the whole heathen world. It required a continual series of miracles to preserve this code, and make it effective even in the Hebrew nation.

In the Mosaic civil code the most defective part, in its estimation of Christians, is that which *permitted* (for it did not encourage) polygamy and servitude. How deep these were embedded in all the usages of the ancient world, and what a miracle would have been required to have rooted them out of the habits of the people, every page of sacred and profane history fully proves. They were identified in fact, with the sin-stricken life of that ancient people. To have exterminated them would have required a supernatural change in the character of nations; a change which patriarchs and prophets inform us was to take place only by means of new dispensations of light, which after ages of suffering should pour their increasing and

concentrated volume on the generations of a distant posterity.

Polygamy was founded on another barbarous custom, so intimately connected with all the ideas of then existent society, that it has not yet disappeared from heathen nations, and was not exterminated from the most enlightened and refined Christians till within a very recent period. Indeed, it cannot be said to be extinguished in any nation which permits the slave trade. This custom was the taking captive in war, and converting into slaves the persons of women and children as well as men. The idea of a modern prisoner of war, to be kindly treated, and exchanged for another, was foreign to any nation of antiquity. It is a creation of Christianity. It was not a prisoner, but a slave, which the ancient law saw in the person of a captive. How could polygamy cease, whilst this custom endured? A most signal instance of this custom occurs, when after the terrible destruction of the tribe of Benjamin, wives were wanting for the remnant, they were supplied first by the four hundred captive virgins alone remaining from the massacre of Jabesh-Gilead, and when these were insufficient, the remainder were supplied by the rape of Shiloh.[1]

Such was the custom of the age, and the captive virgin, whether Jew or Canaanite, when taken in war, had the solitary privilege of her month of mourning for her people, before she might be compelled to become the concubine, rather than the wife of her captor lord.

[1] Judges 31: 7—25.

This custom of war was in truth the only mode by which the consequent custom of polygamy could have any general existence. For God has implanted in the human race *the law of equality in the numbers of the sexes.*[1] Hence, before one set of men can indulge in the luxury of several wives, some other men must have been deprived of their natural rights. This renders it obvious, that not only is polygamy unnatural, but it is absolutely impossible on an extended scale. It is only possible, where one nation becomes the conqueror of another, and converts the captive women into wives; or in a country where the law tolerates such purchases, one man is wealthy enough to buy and maintain several wives. It is an expensive luxury, except in those cases where the wives were only bond-women, and maintained themselves by their labor.

In this custom of war also may be seen the reason, why the law permitted the purchase of wives from the parents, or whoever were the guardians of women. For, capturing women, then purchasing them, and finally converting them into wives, had destroyed all the difference between a slave and a woman.

[1] The law of equality is not only true in the general result, but it is kept true by natural checks and balances, which are most remarkable. These are some of the chief. 1. At *birth* there are more males than females. 2. At *twenty* years of age, there are more females than males; showing that in the intermediate time, death has been most destructive on males. 3. At *forty-five* years of age there are again more males than females, proving that in the intermediate period more females had died than males 4. At *sixty* years of age the females are equal to the males; and henceforward they predominate, as they did at birth. These results correspond with known causes and remarkable examples of the law of natural compensations.

It was an easy transition for the man, who estimated the value of a woman in market by the price of wheat and oxen, to transfer the same estimate to a daughter over whom he held absolute power. This same custom of capturing women, and permitting concubinage, exists among many tribes of North American Indians, and almost under the same circumstances. We there see in practice, what the laws of nature demonstrate, that this species of concubinage could only be the luxury of the few. For, it is only the rich and powerful among the distinguished men of the tribe, who can indulge such expensive tastes.

The great evil of legalizing polygamy is not that very many men are likely to practice it, but that it degrades the female sex, and demoralizes that vast and inseparable element of human society. It casts down a woman the whole depth of that deep gulf which lies between the holy vocation of an intelligent wife, who is the help meet of her husband, and the servile condition of a slave, who is counted by money, and exists at the pleasure of the master. If the laws and usages of society make this legal and proper even in a small number, it degrades the whole sex, and with that the whole body of society, its character, manners, morals and condition. It degrades human nature itself, and never in any country of ancient or modern days, from the palace of Solomon to the Harems of Constantinople, has it been associated with any state of society, which was not in its nature inclining to effeminacy and corruption. The Hebrews were a peculiar people, supported

by divine illumination, and yet the very metaphors and illustrations, used by the prophets, show how strongly this species of corruption had seized on the moral constitution of their society.

There is a beautiful *parallelism* between the condition of woman in her domestic life, and the character of a nation. She is the mother of men, and the former of their minds, at that early age, when every word distils upon the heart, like the dew drop upon the tender grass. There is to that young mind no truth or falsehood in the world but that whose words flow from the mother's lips. There is no beauty in character, nor glory in action, which has not been concentrated by her praise. There is to that climbing child no path where the mother's feet has not trod. Her mind is to his the supernatural pillar of fire, which illumines his midnight ignorance, and the silvery cloud, which at mid-day precedes him in every highway to the world. And, even when science has conducted her pupil through the highest walks of knowledge; or when art has polished him into the accomplished citizen; or when power has dignified him with the memorials of office, *she* still lives in his soul, which she has imbued from her heart's

> "————————————pictured Urn,
> With thoughts that breathe, and words that burn."

It is thus that society is formed in its social and moral ideas, and thus that its condition must ever present on a large scale, a parallelism in its moral life, to the condition of woman. It is not matter of fancy, but a great social fact.

This parallelism existed in Hebrew society. As the Hebrew nation had received a light and knowledge far in advance of surrounding nations, so there were many points of civilization, by which, notwithstanding the permission of polygamy, the Hebrew women were much elevated above those of the pagan people. This was specially the case in the moral law, given them by divine inspiration, and in many guards and checks against impurity of life, and in the cultivation of ideas of piety, veneration, faith, order, respect for law, and for age, in which many even of the enlightened Christians of this day are deficient. The consequence is, that Hebrew life has furnished us, when considered in relation to the prevalent manners of that age, with many sublime and beautiful examples of female excellence.

Rebekah was one of the few examples which ancient Hebrew society has furnished, who was not only a voluntary wife, but who also shared the undivided rights and dignity of a wife. So distinguished was this example, that ever since, the young married pair have been admonished to be, as Isaac and Rebekah, faithful. The sacred writings furnish us with a very brief notice of her life, but there is nothing in the account to diminish aught from a virtuous and honorable character.[1]

A holy trust was seldom more perfectly proved, nor the evils of polygamy in family suffering better illustrated, than in the case of Hannah; who, at the triumph of

[1] The deception of Rebekah in the case of Jacob may be cited to the contrary. It is, however, but a single instance of error, and one which we cannot now fully comprehend.

her husband's other wife, felt bitterness of soul, and wept and prayed. She was still more sad, when from the very fixedness of her grief, and the silence of her prayer, even Eli the priest thought her drunk, saying, "How long wilt thou be drunken?" How beautiful was the reply! "No, my lord, I am a woman of sorrowful spirit. I have drunk neither wine nor strong drink, but have poured out my soul before the Lord. Count not thine handmaid for a daughter of Belial; for out of the abundance of my complaint and grief have I spoken hitherto." Her countenance was no more sad, and when in her joy she rejoiced, how sublime, how admirable, how just the song! "The Lord killeth, and maketh alive; he bringeth down to the grave, and bringeth up. The Lord maketh poor, and maketh rich: he bringeth low, and lifteth up. He raiseth up the poor out of the dust, and lifteth up the beggar from the dunghill to set them among princes, and to make them inherit the throne of glory; for the pillars of the earth are the Lord's, and he hath set the world upon them."[1]

We may not claim the beautiful character of Ruth as exclusively Jewish, for she was a Moabitess; but, we may ask, how excellent must have been the character and instructions of Naomi, when she could inspire such devoted affection, such holy trust, such perfect obedience!

Nor is the Hebrew history wanting in the character of a woman who occupied the most brilliant station of Asiatic society, and yet carried into the splendor and

[1] 1 Sam. 2: 6—8.

temptations of an oriental court her faith, her patriotism, her purity and her courage. Upon the throne of Persia, then an empire extending over one hundred and twenty-seven provinces, from India to Ethiopia, sat Esther, whose remarkable history exemplified the words of Hannah's song: "The Lord raiseth up the poor, and maketh them to inherit the throne of glory." If she was raised up by beauty, she seems not to have been wanting in other and higher qualifications for the heroic destiny to which she was called. She was deeply imbued with the pious reverence and patriotism which made the most remarkable part of the Hebrew education. It was when impelled by this double feeling, that for the salvation of her nation she replied with devoted courage, to a demand for her services: "So will I go in unto the king, which is not according to the law; and if I perish, I perish." We need not pursue farther either the laws or the illustrations of Hebrew polity, as applied to women. It is enough to know that it was impossible, without changing and remodelling the very elements of human nature, entirely to separate any system of laws, from the manners and usages of the age. Something, unless the free will of man was forced supernaturally, must be derived from the customs and morals prevalent in that early and rude age. So it was with the Hebrew system. It was a divine dispensation, giving all the light which the human intellect was then able to bear, and even more than the human heart could endure without the aid of repeated miracles; nor was it endured without repeated failings and awful retribu-

tions. Yet it was, in moral excellence and in civil wisdom, far beyond and above anything in the institutions of pagan nations. It was the foreshadowing, the symbol, but only the symbol, of that perfect system of morals and manners, which the Messiah came to reveal and to establish. It is by the diffusion and prevalence of the last system only, that we may hope that the day will come, when the laws shall be founded on morals, and morals be based upon religion.

SECTION III.

CIVIL CONDITION OF WOMEN IN THE ROMAN EMPIRE.

The Roman empire was not only the most powerful, but the most refined in all the arts of civilization, of any of the pagan nations, which flourished in the midland period of the world. So polished were the laws as well as the manners of the Roman people, that they have descended to, and been adopted by, several of the States of Europe. It was esteemed a memorable event in history, when a copy of the Roman Institutes was discovered at Amalfi. It was supposed to be one of the causes of the revival of civilization and refinement in Europe. From this fact we must infer, what to a certain degree is true, that Roman laws were but little impressed with the spirit of barbarism which pervaded the primitive ages.

Before we analyze the civil condition of women in

Rome, two remarks are to be made. The first is, that Rome was not only a *derivative* nation, but derived doubly from the most polished nation of primitive antiquity. Greece had derived her laws directly from Egypt,[1] and Rome derived hers from Greece. The laws of marriage at Rome were the same which prevailed at Athens, and these were the same which had originated in Egypt. The second remark is, that the best codes of Roman law were not enacted till subsequent to the Christian era, and the promulgation of that mild and beautiful system of morals, which had extorted the admiration even of the most obstinate sceptics. Whether the doctrines of Christianity had in any degree retro-acted on that code which Ulpian and Papinian perfected, is not known; but certainly the chronology of the times admits such a supposition. These two facts, that the Roman jurisprudence was derived through Greece from Egypt, and that the most refined Roman codes were perfected and put forth subsequent to the Christian era,[2] may account for the greater polish, higher equity, and more systematic arrangements which distinguish the Roman jurisprudence.

Let us now review some of the principal points of the Roman law, in relation to women.

1. *Law of Husband and Wife.*

(1) Polygamy, or the plurality of wives, was forbidden among the Romans.

[1] Goguet's Origin of Laws, Vol. II. Bk. 1.

[2] Ulpian and Papinian lived in the reign of Severus, two hundred years after the Christian era.

Law of Husband and Wife among the Romans.

(2) Marriage, among the Romans, was a contract accompanied by various ceremonies, and followed by a total change in property and liabilities. There were three modes of marriage. 1. The most solemn mode was when the ceremony was performed by a priest, in a sort of religious ceremony. It was done by a set form of words, in the presence of ten witnesses, and by tasting a cake made of salt, flour and water. 2. The second mode was by a sort of pretended sale. The parties delivered to each other a small piece of money, and repeated a form of words. The man asked the woman, if she was willing to be the mistress of a family. She answered that she was willing. The woman asked the man the same question, and received a similar answer. 3. The third mode was when a woman, with the consent of her parents, lived with a man for a whole year, without interruption, which constituted a marriage by *use*.[1] This mode, however, could hardly have been regarded as the regular one, or the ceremonial marriage would not have been considered necessary, and much practised, as it was.

(3) Marriage was preceded by a solemn betrothal or affiancement, in which the father of the bride gave his assent to the request of the bridegroom.[2] This ceremony attending the betrothal often took place many years before the marriage, even in childhood, and was called *sponsalia*.

(4) The marriage contract was written and sealed.

[1] Manual of Classical Literature, p. 552. [2] Idem, p. 551.

The bride received from the betrothed a ring as a pledge of fidelity.[1]

(5) The husbands had the right of divorcing their wives without any trial. If the divorce took place between the betrothal and the marriage (as it sometimes did), it was called *repudiation*. If it took place after the second form of marriage, it was called *remancipation*. If it took place after the first (most formal) mode of marriage, particular solemnities were required to constitute divorce.[2]

(6) The consent of parents was required to the marriage.[3] For, by the Roman law, the father has absolute power over his children.

(7) The wife, by marriage, became a partner in her husband's effects. She resigned to him all her property, and he was bound to support her.

(8) At the death of her husband, she inherited his fortune, if he died intestate; but if he had children, she inherited equally with them.[4]

(9) Upon her entrance to the house, the keys were delivered to her, denoting that to her was intrusted the management of the family.[5] A sheep skin was spread before her, intimating that she was to work at the spinning of wool.

2. *Law of Parent and Child.*

(10) Children were under the absolute power of the parents; so much so, that they had the power of life

[1] Manual of Classical Literature, p. 552. [2] Idem, pp. 552, 553.
[3] Cooper's Justinian. [4] Idem. [5] Salkeld's Classical Antiquities.

and death. The grand-children *by sons* were also under the power of the grand-parents; but the grand-children *by daughters* were not; because they were under the control of the grand-daughter's husband's parents, or grand-parents.[1]

(11) The *adoption* of children was a frequent practice among the Romans. The adopted children were treated as children.[2]

3. *Law of Consanguinity.*

(12) Cousins could marry, but no nearer relations. The Roman law of consanguinity excluded all near relatives from marriage, whether by blood or by adoption.[2]

(13) The daughter of a divorced wife, by another husband, was not daughter-in-law to the first husband; but the law *recommended* that there should be no marriage between such persons.[3]

4. *Law of Inheritances.*

(14) Sons and daughters inherited equally.[4] The grand-children also inherited equally, but in right of their parent; that is, the grand-children took *per stirpes* (by root). If the father had three children, A, B, C, and A died leaving children, his children took the part of their father A. This is the American law, at the present time.

(15) Mothers could inherit from their children.[5]

The propositions above recited are sufficient to illus-

[1] Cooper's Justinian, p. 22. [2] Idem, p. 22. [3] Idem, p. 27.
[4] Idem, p. 194. [5] Idem, p. 212.

trate the principal features of the Roman law in regard to women. It is not difficult to see, that the high civilization in the arts, connected with the polish and refinement of Roman manners, had infused itself into the Roman law. If we draw a parallel, in three important particulars, between the condition of women in the days of the Hebrew commonwealth, and their condition in the Roman empire, we shall see that in three particulars, civilization had made great progress.

1. Polygamy was certainly *permitted* among the patriarch Hebrews. It was not lawful among the Romans, however lax they ultimately became in their morals.

2. In the early days of the Hebrew commonwealth, women were *sold* in marriage, and therefore they carried no dowry to their husbands. In the Roman empire, notwithstanding the absolute power of the father over the children, we do not learn that they sold their children in marriage.

3. Under the Hebrew law, daughters could not inherit. Under the Roman law, they inherited equally with the sons.

The marriage of one husband with one wife, the right of voluntary marriage (except that the parents' consent was required), and the right of equal inheritance between sons and daughters, were certainly vast strides in the amelioration of the condition of women, so far as regards the civil law. It is not law, however, which gives the moral tone to society; and we have good reason to believe, that the state of morals was as good

among the Hebrew women, if not better, than it was at any time in Rome.

The wide distinction in the laws of inheritance, prevalent respectively in the Hebrew and Roman systems, leads to the inquiry, what could have been the original cause of this distinction? The question seems to be easily answered. For purposes connected with the peculiar religious government of the Hebrews, it was clearly an object of the Hebrew law to preserve the landed inheritance of the twelve tribes of Israel, and of the heads of families, in the tribes and families in which they originally commenced. For this object, sons alone were allowed to inherit; for, if daughters could inherit, they would transfer, through their husbands, the estate from one family to another. So for the same purpose the year of jubilee was instituted, when all the landed estates, however alienated, returned to the families which had originally possessed them. Thus, for the purpose of carrying out the religious administration peculiar to the Hebrews, lands were perpetuated in the same families and tribes.

On the other hand, the Roman nation were a people who had extended themselves by conquests. Their original possessions were but a small portion of that vast dominion over which their giant empire extended its victorious power. So also the Roman empire occupied a period in human history when commerce was much extended; not indeed at such a rapid rate, as it is now whirled onward through the world, by the locomotive powers; but yet at a rate and in a manner very

different from its progress in the days of Egypt and of the Hebrew commonwealth. Neither the Egyptians nor the Hebrews were a commercial people. Both the lands of Egypt, and those of the Hebrews, were secured in families, on a principle not essentially different from that which subsequently governed the feudal system. Hence, there was in the very elements of their system an inaptitude for that subdivision of property, and that continual colonization, which are both cause and effect in a commercial nation.

Not such was the principle of all-conquering Rome. She extended her territory by conquests. Extension required colonization. Colonization required successive emigrations from the citizens of the original territory. This emigration required a separation from the original estates; a yielding up to other families, and other names, and other tribes of that family soil, which with the Hebrews was deemed so sacred, that only the sons could inherit it, and once in fifty years must return back, in title and possession, to the descendants of the original possessor. Such an institution would have been utterly incompatible with the elastic nature of the Roman system. Rights of property were therefore not confined to particular classes of heirs. But there were restrictions on the transfer of persons and property from one rank to another, as for example, from the patrician to the plebeian; because Rome was, in its nature and formation, an aristocracy, and therefore the whole tendency of its laws and institutions was to preserve and extend that aristocracy. For this purpose it was first

enacted, that there should be no marriages between patricians and plebeians. This law was repealed; but it was enacted, that if a patrician lady married a plebeian, she should lose her patrician rank.[1] This rule, however, is very little different from that which custom has established in the United States. For, with very rare exceptions, the woman in our country must follow the fortunes and condition of her husband. If therefore she chooses to marry an inferior man, she must abide the consequences.

It was the extension of the Roman territory, and the increase of commercial colonies,[2] which probably caused the Roman law of inheritance, as it respects women, to be much more liberal than the Hebrew code. To this, therefore, we refer the fact that daughters, by the Roman law, inherited equally with sons. This certainly was a vast improvement on that legal condition in which they could not inherit at all.

Notwithstanding the absolute power of the father over the children, marriages at Rome seem to have been in a great degree free. At least, women were not treated exactly as slaves. They were not put up, by their fathers, and positively sold. There can be no doubt that the parental influence was fully exerted, and

[1] Salkeld's Antiquitie, p. 79.

[2] I am well aware that Montesquieu says the Romans had no spirit of commerce, and troubled their heads very little about it. This is in a great degree true. But it is not the spirit of their minds, but the *facts of their condition*, of which I speak. They had many colonies, a constantly increasing territory, and a foreign trade. Laws follow facts. Such a people would, in the very nature of things, liberalize the laws of inheritance.

that most marriages in the higher ranks were made, as the moderns say, *for convenience.* But if it were so, in what did the custom differ from that of the Christian aristocracy in modern times? It is only in republics, and it may yet appear, only in the early ages of republics, where the heart is allowed the pleasing and charming simplicity of choosing its own companions. But this is the fault of increased wealth, luxury, conventional forms and fashionable rules, rather than the civil law. The law but follows usage. It is one of the melancholy facts of history, that certain diseases and corruptions seem to be inevitably attached, in the constitution of nations, to the progress of time and civilization. We may console ourselves with the reflection, that as some old persons seem to retain the verdure and cheerfulness of youth, so some countries may escape the diseases of age and art, acquiring in their maturity only vigor and development. At least, such may be our hope, while we know no positive law which dooms nations to the cycle of growth and decay, decline and fall.

It is certain, however, that such has been the career of all people fully civilized, and in none more signally marked, than in the once surprisingly magnificent Empire of Rome, whose eagle spread his wings from the peninsula of Spain to the shores of the Danube, and from the banks of the Indus to the Isles of Greece, and the Pyramids of the Nile. Whatever other causes more ultimate and deep founded may have occasioned the fall of Rome, it is certain, that it was accompanied by a real and wide-spread *corruption of the family con-*

stitution. Notwithstanding polygamy was not a vice of the Roman Law; notwithstanding wives were raised above the dignity of slaves, and notwithstanding, since they inherited property, they had a dowry to bestow, such was the aversion of young men to marriage, in the time of the empire,[1] that they could not be induced to marry either by the greatest rewards on one hand, or the greatest penalties on the other. To enforce marriage, the emperor Augustus imposed new penalties on such as were not married, and increased the reward both of those who married, and those who had children.[2]

Notwithstanding all these laws, the Roman knights, on account of their *aversion to marriage,* insisted upon their repeal. The emperor then placed those of the knights who were married on one side, and those who were unmarried on the other, when the citizens were astonished to find the unmarried were the greatest number. Augustus then addressed them in grave and severe language, concluding with these words, "my only view is the perpetuity of the republic. I have increased the penalties of those who have disobeyed; and with respect to rewards, I do not know whether virtue has ever received greater. For less will a thousand men expose life itself; and yet will not these engage you to take a wife, and provide for children?"[3] Notwithstanding all these efforts of the government, marriages were not popular in the declining days of Rome, and it was with the utmost difficulty population could be kept up. No severer picture of the depravation of

[1] Spirit of Laws, Vol. II. p. 88.

[2] Montesquieu, Bk. 23, Chap. 21.

[3] In the year of Rome 762 Dio, Lib. 56.

morals at Rome could be drawn by pen or pencil, than that which history thus gloomily records in the undeniable facts of society. *Why* was it, some one may ask, that in a state of society, in which the civil laws, as regarded freemen at least, were very much ameliorated, as to person and property; that the constitution of the family was so much corrupted, that marriage became almost intolerable? We may suppose, knowing only the facts which the law and history present, three reasons, which taken together were sufficient to produce such an effect.

1. By the Roman Law, both husband and wife had the power of *voluntary repudiation*, that is, natural divorce. This too was a law, which came into practice only in the days of the Empire. Whether it was a consequence of an already corrupted state of society, or whether it produced that corruption, it is certain that nothing could have weakened the marriage ties more, or have more effectually destroyed the reverence and respect which should ever be felt towards that relation. The *immutability*, and as we may say, the solid foundations of the marriage contract, is what adds vastly to its dignity and importance. It was viewed in this light by Christ himself, when he expressly forbid any cause of divorce save one, and that one of rare occurrence in any tolerably devout or virtuous state of society. The thousand insufficient reasons which modern casuistry has invented, arising out of whim, caprice, bad temper, mutual disagreement, malconduct, and as modern lawyers have discovered, *incompatibilities of disposition*,

had no place in that pure code of law, to which the Saviour of mankind affixed his seal. He said that man and wife must cleave together. He built the constitution of society on this constitution of the family. He furnished no cement for government, which had not already cemented the social elements in the bonds of the family.

The same view seems to have been taken by the Romans, in the early ages of the republic. For it is recorded, that no divorce took place for five hundred and twenty years after the foundation of the Roman Republic.[1] The law however existed, and when the effects of conquest and extended empire took place, in the increase of luxury, and the licentiousness of manners, then this law of unlimited divorce played its part in extending still wider and deeper that licentiousness, till it broke up the foundations of the family state, and with it the very existence of the nation. We find such illustrious men as Pompey, Antony and Caesar, repudiating their wives for the slightest possible cause. One repudiates his wife from suspicion, another from incompatibility, a third from some equally groundless cause, and the stream of unreasonable and frivolous domestic conduct, commencing in the highest walks of society, continued to flow through all ranks and conditions of people, till its miasm bred disease in all parts of the body politic.

2. A second reason why the young men of Rome may have entertained aversion to marriage, may be found

[1] Langhorne's Plutarch, Vol. I. p. 121.

in the prevalence of that licentiousness of manners of which we have spoken. It is not necessary to the objects of this work to trace that licentiousness to its original causes. It is sufficient to say, that in a nation, which in the progress of continual conquests had accumulated sixty millions of slaves,[1] it would be much more difficult to show why it should not exist, than why it did, even in its enormous extent. The Satires of Juvenal, the ruins of Herculaneum and Pompeii, with all authentic history of the Roman manners in the days of the Empire concur, that never in any age or nation of the earth did greater domestic corruption exist. How then could any young man know, that in the marriage state he would find, or keep domestic purity? How could he know that he would be able to retain his wife, when for the slightest causes she could divorce him?

3. Another, and with many a sufficient reason for aversion to the marriage state may be found, in the very expensive habits which the effeminacy of slavery, the outward show and splendor rendered necessary by aristocratic institutions, and the apparent wealth, not real, introduced by foreign conquests, required in the families of the highest order of society. No people ever indulged more in the pleasures of the table, the number of servants, the parade and pomp of high life, than did the Patrician Romans. They gave the example, and formed the manners of the people. In fact there was no ruling people in Rome, but those who in some form or way made up the aristocratic order.

[1] Gibbon's Calculation.

Such a life was in its nature highly expensive, and it is no wonder that the knights of Rome looked upon it with dread. The same causes will produce the same effects in any nation. In truth, these same habits in high life have tended in Europe to make marriage later in point of years, and to poison the peace of families with not a few of the evils, which attended the marriage state in Rome. These evils, however, exist in a far less degree in Europe, and in the United States they exist not at all, except among a very few in the large cities.

Such were the causes which occasioned this remarkable aversion to marriage among the men of Rome; causes sufficient to undermine the whole fabric of society; which did in fact undermine it, and so corrupted the Roman constitution, that it was unable to resist the encroachments of the northern Barbarians; and which, when Christianity had fairly commenced its freshening influences, brought that ancient empire into ruins, and left it a monument to other days of the weakness of any political power, when unaided by virtue.

Notwithstanding the heathenism of Rome, notwithstanding the corruption which gradually stole over her glory in the days of the empire, and notwithstanding the continual presentation in society of the forms of cruelty and barbarism; yet the records of scarcely any nation known to history have presented so many remarkable instances of noble and virtuous women. There was a spirit of devotion to family, to country, and to honor among the people of ancient Rome, which was

frequently most illustriously manifested in the female character.

A few of these instances we will select to illustrate in a clearer and stronger manner, than any general description could do, the characteristics of the best class of Roman women. There are some which stand out in Roman annals nearly as conspicuous as her warriors, poets and statesmen.

Of this class was CORNELIA, the mother of the Gracchi. In this lady every circumstance of birth, life and character, conspired to give her a glowing and ever-living page in history. Two thousand years have passed away, and yet her name and her character stands out as freshly, as if she had been cotemporaneous with Elizabeth and Mary. She was the daughter of Scipio Africanus, the conqueror of Hannibal. Such descent could hardly have received an addition of glory or distinction. Yet, such was the life of Cornelia, that even the fame of Scipio received new lustre. She was married to a man, who though he filled many high Roman offices, yet derived still greater dignity from her virtues.[1] This was Tiberius Gracchus, the grand-son of Sempronius, who was eulogized by Cicero for wisdom and virtue. He was thought worthy of Cornelia, and the event proved that one was as remarkable as the other, for what in that age of the world must have been deemed the highest excellencies of the human character. Tiberius died, leaving Cornelia with twelve children. Her character was such, that Ptolemy king of Egypt paid his

[1] Langhorne's Plutarch, Vol. V. p. 1.

addresses to her, but was rejected.[1] She devoted herself to the care of her house and children; in which she behaved with the greatest sobriety, parental affection and greatness of mind. During her widowhood, she lost all her children except three, one daughter who was married to Scipio the younger, and two sons, Tiberius and Caius Gracchus. Plutarch remarks, that "Cornelia brought them up with so much care, that though they were without dispute of the noblest family, and had the happiest geniuses of any of the Roman youth, yet education was allowed to have constituted more to their perfections than nature." This remark may show in forcible colors the vast influence of mothers in the education of youth. It is certain that there is no natural geniuses which may not be improved by education, and it is equally certain that no human being can have as much influence on that education as the mother.

Cornelia, like all the leading women of Rome, had imbibed the heroic, or ambitious spirit of the age. She is said to have made remarks to her sons which served to spur them on more rapidly in their public career. The result was not very fortunate. For though her sons sustained the highest name for purity of character; though they have come down to us, distinguished as *the* Gracchi, and though they were associated with the popular cause, yet their measures were so revolutionary and violent, that they were both destroyed in popular tumults.

[1] Langhorne's Plutarch, Vol. V. p. 2.

Character of Cornelia.

Cornelia survived the death of her sons, which she bore with great magnanimity. They had been killed on consecrated ground, and of these places she said, that "they were monuments worthy of them." She lived subsequently a life of elegant and hospitable ease, surrounded by men of letters, and courted by the great. We cannot have a better idea of the close of her life, and of the high estimation in which she stood, than by the very words of Plutarch.[1] This writer closes the lives of the Gracchi with this account of Cornelia.

"She took up her residence at Misenum, and made no alteration in her manner of living. As she had many friends, her table was always open for the purpose of hospitality. Greek, and other men of letters she had always with her, and all the kings in alliance with Rome expressed their regard, by sending her presents and receiving the like civilities in return. She made herself very agreeable to her guests, by acquainting them with many particulars of her father Africanus, and of his manner of living. But what they most admired in her was, that she could speak of her sons without a sigh or a tear, and recount their actions and sufferings as if she had been giving an account of some ancient heroes. Some therefore imagined that age and the greatness of her misfortunes had deprived her of her understanding and sensibility. But those who were of that opinion seem rather to have wanted understanding themselves; since they know not how much a noble mind may, by a liberal education, be enabled to support itself against

[1] Langhorne's Plutarch, Vol. V. p. 35.

distress; and that though, in the pursuit of rectitude, Fortune may often defeat the purposes of VIRTUE, yet VIRTUE, in bearing affliction, can never lose her prerogative."

The whole life of Cornelia presents a beautiful character; and from the facts which have come down to us we may draw these inferences. 1. Cornelia must have been educated in a very superior manner by *her father.* For in no other manner can we account for her knowledge and love of literature; nor for the fact, that while yet young she was regarded as worthy of the most virtuous and noble men of Rome. 2. She must have been, from the beginning, a woman of *fixed principle* and *undaunted courage;* for, in no other manner can we give a solution to her rejection of the king of Egypt, her unremitting care of her family, the high education of her sons, and the great influence she held over them. 3. She must have *cultivated* literature and the graces of conversation; for, how else could she have drawn round the fireside of a retired widow, the men of letters, and even the compliments of distant princes?

From all this we may draw the conclusion, that it is quite possible for a woman to be a woman of letters, and yet a good housekeeper, a good mother, a very agreeable companion, and a useful member of society. It is true, that all women cannot have the same early advantages, the same parental care, the same rich opportunities, and the same splendid line of life. Yet how few are they who have improved, to the same advantage, the talents with which they have really been

endowed? And, yet more, how few are the fathers and mothers who think these riches of the immortal MIND at all equivalent to the petty accomplishments of fashion? Yet it is these high qualities of mind alone which survive, like the eternal laws of nature, all the modes of fashion and the revolutions of time. From this living fountain flows all the bubbling, sparkling, running waters of life. It overflows beyond the boundaries of life, and enriches every territory of distant posterity.

But Cornelia was not alone in the brilliant circle of Roman matrons. It might be difficult in all the accomplishments of the intellect, and in illustrious virtue, to equal, from the public annals, the daughter of Scipio. Yet there are others, whom their country has perpetuated in the voice of a pure and a far-sounding fame. Of these PORTIA, the wife of Brutus, was one. She was the daughter of Cato the Younger, and was chiefly remarkable for the energy and fortitude which was so often developed in the Roman character. She did not derive any extraordinary degree of domestic virtue from her father, who, however celebrated, was not very strict in his family morals.[1] Portia was herself of most exemplary character. Her first husband was Bibulus; but she became a widow very young, and married her cousin Brutus. One of the most remarkable traits of character recorded of her, took place during the conspiracy against Caesar, in which her husband was one of the chief actors. She had observed him manifest great signs of uneasiness, starting in his sleep, or immersed in

[1] Plutarch, Vol. IV. p. 340.

thought. She knew that something pressed upon his mind, and resolved not to pry into her husband's secrets till she knew she could keep them. For this purpose she ordered out all her attendants of the apartment, and gave herself a deep wound in the thigh. This caused an effusion of blood, pain and fever. She then went to Brutus, and showing him the wound she had made, demanded the secret in the name of affection, fidelity and courage. Brutus was struck with surprise, and prayed that he might become worthy of Portia.

This scene is described by Shakspeare, in the play of Julius Caesar, almost in the words of history. In Act 2d, Scene 1st, Portia meets Brutus in the garden, and this conversation occurs.

Portia. "————And, upon my knees,
I charm you, by my once commended beauty,
By all your vows of love, and that great vow
Which did incorporate and make us one,
That you unfold to me, yourself, your half.
Why you are heavy; and what men to-night
Have had resort to you; for, here have been
Some six or seven, who did hide their faces
Even from darkness.

Brutus. Kneel not, gentle Portia.

Portia. I should not need, if you were gentle Brutus.
Within the bond of marriage, tell me, Brutus,
Is it excepted, I should know no secrets
That appertain to you? Am I yourself,
But, as it were, in sort, or limitation;
To keep with you at meals, comfort your bed,
And talk to you sometimes? Dwell I but in the suburbs
Of your good pleasure? If it be no more,
Portia is Brutus' harlot, not his wife.

Brutus. You are my true and honorable wife;
As dear to me as are the ruddy drops
That visit my sad heart.

Character of Portia.

Portia. If this were true, then should I know this secret.
I grant, I am a woman; but, withal,
A woman that lord Brutus took to wife:
I grant, I am a woman; but, withal,
A woman well-reputed Cato's daughter.
Think you, I am no stronger than my sex,
Being so father'd and so husbanded?
Tell me your counsels, I will not disclose them:
I have made strong proof of my constancy,
Giving myself a voluntary wound
Here, in the thigh: Can I bear that with patience
And not my husband's secrets?
Brutus. O! ye gods,
Render me worthy of this noble wife!"

This scene is almost in the very language of Plutarch, who says he took the facts from a life of Brutus, then extant.

After the death of Caesar, when Brutus was compelled to leave Italy, he parted with Portia at the town of Elea. There, at the moment of parting, she cast her eyes upon a painting of the farewell of Hector to Andromache, and the young Astyanax. The resemblance of the scene to her own sorrow, made her burst into tears, and weep before that melancholy emblem. Plutarch relates this occurrence. Acilius, a friend of Brutus, repeated the passage in Homer, where Andromache says:

"Yet while my Hector still survives, I see
My father, mother, brethren, all in thee."

To which Brutus replied with a smile, "But, I must not answer Portia as Hector did Andromache;

"————Hasten to thy tasks at home,
There guide the spindle, and direct the loom."

"She has not personal strength, indeed, to sustain the toils we undergo; but her spirit is not less active in the cause of her country."

Brutus never looked upon Portia again. She died before Brutus, and it is said by her own hand, in consequence of the neglect of her friends.

The character of Portia seems to have been much nearer the common standard of high bred women, than that of the accomplished and commanding Cornelia, whose grandeur and supremacy of spirit seems to have swayed both the minds and hearts of all around her. Portia on the other hand was more strictly feminine. She gushed out with warm affection to her husband. She felt the dignity of her Patrician descent from the family of Cato. She was full of anxiety for her own friends, and she entered into the spirit and enterprises of the times. If the anecdote about the painting and quotations of Brutus be true, and we have no reason to doubt them, it gives us some insight into the spirit of Roman education. Both Brutus and Portia must have been familiar with Homer. This shows how much the Roman literature and education was founded upon that of the Greeks. Many distinguished men, and probably Brutus himself, visited Athens to finish their education. Brutus was familiar with the Greek philosophy, and as Portia was his cousin and the daughter of Cato, she must have had a highly finished education. It is more than probable that the Roman women of the higher ranks had a better education in proportion to the men, than the women of our country. They were educated

more in the solid, than in the merely ornamental knowledge of life. They were not estranged altogether from the politics and the higher philosophy of their country. They read, in common with fathers and husbands, the stern and yet brilliant literature of the ancient Greeks. Barbarous and heathen as it was, it had the advantage of being exempted from the effeminacy and corrupting influences of oriental manners.

Two centuries after the era of Cornelia, and nearly a century after that of Portia, lived another Roman lady who flourished in the very prime of the Roman Empire. This was AGRIPPINA, the daughter of Julia, and granddaughter of Augustus. She was in all respects a very perfect specimen of the Roman character exemplified in a woman. She had all its ambition, all its energy, all its haughtiness of carriage, and all that ruggedness of personal virtue which distinguished the Roman in the days of the Republic. What we know of her is derived chiefly from the elegant and painter-like pen of Tacitus. From him, we shall take a few brief sketches of her life. If to be portrayed in living and most graphic colors, by one of the most classic and beautiful of historians, can prove the superiority of a woman, or give distinction to her name, such superiority and distinction belonged to Agrippina. It was the age of the Julian family, and Tacitus was the historian. Agrippina married Germanicus, the adopted son of Augustus, and nephew of the emperor Tiberius.

It was the fortune of Germanicus to be at once high in rank, of great abilities, and of exceeding popularity,

and yet on this very account, to have caused such jealousy and dislike in the emperor Tiberius, that it ultimately occasioned his ruin, and the death of his accomplished wife. Their joint stories is a melancholy and most interesting interlude in the annals of a great nation. The jealousy of Tiberius was first aroused by her energetic conduct while with her husband's army in Germany. The army had been divided into two divisions, and the part with which was Agrippina was seized with a sudden alarm by a report that the other was defeated. The frightened troops proposed to demolish the bridge over the Rhine, and it would have been done but for the conduct of Agrippina. She at once took upon herself the functions of a general officer, and behaved with heroic spirit. She attended to the wants of the men, distributed clothes to the indigent, and medicine to the sick.

She reviewed the troops, and returned thanks on their return, for their valor. Tacitus says, "This conduct alarmed the jealous temper of Tiberius; such active zeal, he said, sprung from sinister motives; those popular virtues had not for their object the enemies of Rome. The soldiers were caressed for other purposes. What remained for the commander-in-chief, if a woman can thus unsex herself at the head of the eagles? She reviews the legions, and by largesses draws to herself the affections of the men. Was it not enough for her ambition that she showed her son to the army, and carried him from tent to tent, in the uniform of the common soldier with the title of Caesar Caligula? This wo-

man towers above the commanders of the legions, and even above their general officer. She can suppress an insurrection, though the name and majesty of the prince makes no impression." These were the reflections that planted thorns in the heart of Tiberius.[1]

At last, Germanicus was taken sick, and died in the prime of his life. As the minister of state was his violent enemy, and Piso, a rival commander, was also bitterly hostile to him, he was supposed to have died of poison. On his death-bed, he turned to his wife, and "earnestly conjured her by the memory of her husband and by their mutual children, to abate from the pride and fierceness of her disposition; for, that to return to Rome and bend to the stroke of adversity, not provoking by vain competition the resentment of enemies too high in power,—was all that now was left."[2] This advice shows clearly, that with her purity and integrity of character, she had vast pride and ambition. The advice was good. But the high spirit of Agrippina could not be controlled, and she perished by her own imprudence.

Agrippina believed, as her husband believed before, that he had been poisoned, and pierced with grief, departed for Italy with the ashes of Germanicus. She went accompanied by her orphan children, to demand justice, and was everywhere beheld with compassion. She pursued her voyage in the rigor of the winter, and with rough navigation, bent on obtaining justice. On the way she was everywhere hailed with respect, and

[1] Annals of Tacitus, Bk. 1, paragraph 69. [2] Tacitus, Bk. 2, Sect. 72.

the people mingled their grief with hers, for the death of Germanicus.[1]

The issue of all this was unfortunate for Agrippina. The emperor of Rome was Tiberius, whose sullen, dissimulating, jealous character, is so strongly painted by Tacitus. The sympathy of the people with Agrippina was her ruin. "Nothing," says the historian, "touched Tiberius so near as the decided affection of the people for Agrippina, who was styled the ornament of her country, the only blood of Augustus, and the last remaining model of ancient manners." This sort of praise only excited the jealous hostility of Tiberius, and from that time forth, his measures were silently, but decisively taken against both the character and the person of this celebrated woman. Nor did she fail, in her fiery character, to furnish material to his enmity. Piso,—the supposed murderer of Germanicus,—was condemned, but there all agency of the emperor, favorable to the family of Germanicus, terminated. A friend of Agrippina was prosecuted for high crimes. Here she manifested both her courage and her imprudence. She rushed into the presence of the emperor, saying, "Why is Claudia Pulchra devoted to destruction? What has she committed? She has loved Agrippina—to excess has loved her; that is her only crime. Improvident Woman!"

Wearied out with affliction, this proud woman resolved on a second marriage. As a member of the imperial family, she was obliged to consult the emperor.

[1] Tacitus, Book 3, Section 1.

Her remarks to the emperor embody a sentiment, which though coming from a Roman matron, have no doubt found an echo in the heart of many a widow. She desired Tiberius to consider—"that widowhood is a state of destitution. A second marriage might assuage her sorrows. The season of her youth was not entirely past, and for a woman of honor there was no resource but in the conjugal state. There were at Rome, citizens of illustrious rank, who would with pride take the widow and children of Germanicus to their protection."[1] Tiberius thought he saw the spirit of ambition in this proposal, made no reply, and Agrippina was never married again.

We need not pursue in detail the mournful narrative of tragic events, which ended in the death of this noble woman. She and her children were persecuted under different pretexts, by Sejanus, the crafty minister of Tiberius, till she was finally arraigned before the senate, cast into prison, and there perished by a violent but unknown death.

The character of this illustrious woman presents some of the strongest points, both of the good and bad in Roman life. She was frank, upright, sternly courageous, and unimpeachably virtuous. She was faithful and loving to her husband, watchful and anxious for her children. Yet with all this, she was excessively proud of her noble descent; fiery and impetuous in passion, indiscreet in speech, and imprudent in conduct. This is a mixed character, but a shining one. It was one

[1] Tacitus, Book 4, Section 53.

which fell short of Cornelia, but excelled all common fame.

The women whose character we have selected from Roman History, lived in, and adorned the highest walks of Roman life. They are not the worst examples to exhibit the true features of the social system, because they were exalted above the common mass. On the contrary, if history has emblazoned or exaggerated their shining qualities, it has also been careful to mark their errors. In the exhibition of both so strongly marked, we get a very close and correct view of what were deemed the vices and virtues of Roman society. Undoubtedly the character of most women at Rome, in the time of Agrippina, never compared with her in purity and integrity. This we know, but we also know that the salient points of what was deemed the highest character in Rome, were presented in her life, and we may fairly estimate their value. We desire here to notice some characteristics of Roman Education and Manners among women, as they are manifested in the lives we have sketched, and in others of the same era.

1. We should infer from all we know of Roman women, that the higher class at least, among them, were well educated. We might infer this, if we had no other information, from the actions and character of such women as those we have delineated. Cornelia attended to the edcuation of her sons, two of the most brilliant men of Rome, herself, which she could not have done unless she had a superior education. She, however, we know by her after life, was a person of superior lit-

erary taste and acquirements. So also of Portia, the reference to the picture of Andromache, the quotations made, all show that the Iliad was not only read, but perfectly familiar, both to Brutus and his wife. In fact, the Greek literature seems to been have thoroughly studied by all well educated Romans, both men and women. 2. We see from the actions and remarks of Roman women, that they had fully imbibed the heroic spirit of the age, and perhaps the world could not have furnished a stronger contrast, than between those women, and the women who have been educated in the spirit of Christianity. There was no such book as the Bible, and no such morals as those inculcated by it, in Rome. The spirit and the manners of their nation and age, were formed chiefly on the models furnished them by the Greeks. Homer had combined and sculptured these forth poetically in the inimitable Iliad. The heroic spirit of the republic, therefore, continued to be cherished, but in a more refined state, in the brilliant and flourishing era of the Caesars. Cornelia, Portia, and Agrippina were all filled with it, and their souls breathed it out in all forms. It was in this spirit, that Cornelia educated the Gracchi, and imparted to them that fiery ambition which finally destroyed those whom she fondly called her jewels. In the same spirit Portia sought the dangerous secret of her husband, sympathized with him in his conspiracy, and uttered no remonstrance against the violence of his conduct. In the same spirit Agrippina took the command of the Roman army at the bridge of the Rhine, returned to Rome

with the ashes of Germanicus to avenge his death, and sought by all means to aggrandize her family. This was the Spirit of the Classic Ages, and the women of Rome could not be, and were not separated from it. 3. We see also that in consequence of the aristocratic features of the Roman constitution, and this heroic spirit that there was in public sentiment and in public acts, a continual appeal to the pride of country and the pride of family. The nature of the Roman Government and its spirit of conquest made the pride of country a more decidedly prominent feature, than it has been in any Christian country. It was more a mark of personal distinction, as we see in the conversation between Paul and the Roman officer, to say "I am a Roman," than it has been since to claim citizenship in any other country. From the broad distinction between Patricians and Plebeians, and from the dependence of clients on families,—family distinction arose in the same way. The result of all this was to make Romans willing to die for their country on one hand, and for their family on the other. Individuality was therefore of less importance then, than it is now; but country and family of more. The distinction is obvious in every line of history, which records the events of the two species of civilization. Roman women participated in the predominance of these sentiments, and especially in the pride of family. It had great power through the influence of reputation, in preserving the character and purity of life in the highest rank of Roman women.

No one can read Roman history, without seeing that

what we call civilization, a prevalence of all known arts, a great refinement of laws, a luxuriousness of manners, and a general elegance of taste, not manifested by other nations of the same period, predominated in that remarkable people. In all this, both by family influence, personal education and public consequence, the Roman women had as large a proportional share as the women of modern nations. In one thing, and that the greatest in importance, we suspect they had more. That is, in the education of their sons. We do not certainly know that they had; but many Roman women are mentioned, like Cornelia, as having participated in the education of their children. This was of vast moment.

In personal regard, and courtesy, they probably stood less high than modern women. For, in the heroic ages, men were relatively of higher value in regard to women; and in civilized Christian countries, there is a peculiar civility and mildness of manner towards them.

In conclusion we remark, that as Rome was a peculiar country, in civilization and aggrandizement; so its laws were peculiar, and they have come down to us a lasting monument to the remarkable genius of a heathen nation.

[1] A country is civilized in its own era, when it has attained *the highest known excellence of arts and manners;* [1] ut, this highest excellence may be far surpassed in subsequent ages, and this very nation, as compared with a subsequent one, deemed almost barbarous.

SECTION IV.

CIVIL CONDITION OF WOMEN UNDER THE FEUDAL SYSTEM IN ENGLAND.

What is called the Feudal System was the characteristic of the Middle Ages of Europe. It may be said to have been the only form of civilization from the downfall of the Roman Empire, to the introduction and prevalence of the modern commercial system. In England, this period extended from the conquest by William the Norman, to the Revolution of 1689; for it was not till then, that the liberties of the subject can be said to have been secure, or the power of the great barons entirely broken up. Indeed, the main features of the feudal law of landed property continue to this day; but, that part which relates to personal claims, and services, has long since been repealed. They began in fact to relax their rigor, by the time of Magna Charta, and by the reign of Elizabeth were very nearly extinguished. The *rights of citizen*, however, which were the antagonism of feudal services, were not fully developed and defined till the Revolution of 1689.

This feudalism was very peculiar. We find some resemblances to it in the Roman system, and some in other nations; but, as a whole, it seems to have been nurtured and manifested in that disruption of old things, and prevalence of a military discipline over them which grew out of the overthrow of the Roman empire. It was a military system entirely. Hence, it was in many things, severe and harsh. In others, it was mild and

humane. The laws in relation to women were of the same inconsistent kind. Some were very mild, and some very rude. The reason of this is obvious. The nations of Europe had become Christian, and were governed by Christian morals. In what regarded the purity of families, and the rules of private conduct, they were superior and more refined, at least in the principles of law, than the heathen nations could have been. But, as the code was a public and political one governed by the principles of war, the rules of property and of political service were harsh. The grand principle of the whole was, that *all persons should render military service for the property they held.* As women could not render personal military service in the field, this rule came hard upon them; for, they were obliged to yield certain privileges and interests of property and person, to meet this non-performance of military duty. As to those who were laborers, holding no property, they were as the serfs of the north of Europe are now, attached to the soil, and may be termed land-slaves. The women were, of course, raised little above the condition of slaves. These facts do not present a state of things very favorable to the female condition, and except in their moral life, which was generally better than in preceding ages, we find little in history to make the picture brighter. We shall sketch a few brief heads of the feudal laws of women.

1. *Law of Husband and Wife.*

(1) Polygamy could not exist under the English Feudal system.

This followed of course from the adoption of the Christian code of morals; for, in that code, one woman must be the wife of one man.

(2) Marriage was a sacrament, that is, it must be performed by the clergy, according to the rules of the church, and could only be dissolved according to the rules of the church.

(3) The Lord, or Guardian, or Superior Tenant in the feudal system, had what is called the *right of marriage*, that is, the superior tenant, or lord, had the right in chivalry, of disposing of his infant ward in matrimony.

(4) As the Feudal Tenant was, in the theory of the Feudal Law, always the heir of some lands, which went as a dowry to the infant ward, the right of giving the ward in marriage had a pecuniary value. The guardian had the right of *tendering the ward*, male or female, a suitable match, provided it was not an unequal one. If the minor refused the marriage tendered, he or she forfeited the value of the marriage to their guardian. That is, they forfeited as much as any one would have given for such an alliance. If the minor, after the marriage tendered, married without the guardian's consent, he or she forfeited double the pecuniary marriage value.[1]

[1] 2 Blackstone, 70.

2. *Law of Inheritances.*

(5) Under the Feudal Law, the rule is, that the males shall be invariably preferred to females, in the inheritance. Thus, if the father in the feudal law had an inheritance of five hundred acres of land, and left two sons and four daughters, the daughters would inherit *nothing*. The whole would go to the eldest son ; for among sons the eldest was preferred.[1]

(6) If a man left five hundred acres of land, and three sons, the *eldest* of the three would inherit the *whole*. On the other hand, if he had left three daughters, they would inherit the land *equally* divided among them. That is, where there are sons and daughters, the daughters inherit nothing, and the eldest son everything; and among sons the eldest is preferred, and among daughters, they share, and share alike.[2]

(7) Where there were *collateral inheritances*, the male stocks were preferred to the female.[3] That is, the relations on the father's side are admitted to any degree in the inheritance, before the relations on the mother's side are admitted at all ; and so also of the grand-father, and grand-mother.

3. *Law of Consanguinity.*

(8) The law of consanguinity in the feudal law was the same with that of the Levitical Law. That is, there could be no marriages within the degree of first cousin.[4] Prior to the time of Henry the Eighth, the Ec-

[1] 2 Blackst. 213. [2] 2 Idem, 214. [3] 2 Idem, 234. [4] 2 Idem, 435.

clesiastical, or Canonical Law governed marriages, and the Roman pontiff often made the rule even more strict than this.

4. *Law of Divorce.*

(9) As Marriage was a Sacrament of the Church, it followed, that it could be dissolved only by the Church. Hence arose the Ecclesiastical or Canonical courts, which assumed the whole jurisdiction over marriage and divorce. A divorce *total*, or as it is called, *vinculo matromonii*, could only take place when the cause existed *prior to the marriage*, that is, when in fact it was originally *void*. In all other cases, the divorce was a *separation* only.[1]

In the foregoing features of the Feudal Law, in relation to women, we see that in fact, the law of feudalism in regard to women, was our present law, except in respect to *Feudal Tenures and divorce*. In comparing it with the Hebrew and Roman Law of women, we may observe these differences :

1. In the Hebrew Law, POLYGAMY was allowed ; but not allowed under the Roman, or the Feudal Law. Both the latter systems then have the advantage of the Hebrew code in this.

2. In the Hebrew and Roman code *voluntary divorce* was allowed. Under the Feudal Code, it was not allowed. In this particular, then, the Feudal Law was better than either of the former.

3. Under the Hebrew system, a woman could be

[1] 3 Blakst. Comm. 94.

sold by her father in marriage. Under the Roman and Feudal Law, she must have the consent of her father, but she could not be sold. In this particular, then, the Roman and Feudal Laws were again the best.

4. Under the Hebrew Law, a woman could not inherit lands. Under the Feudal Law she could not inherit lands, except when there were no sons. Then the daughters inherited equally, and the same principle was ultimately adopted into the Hebrew code. In the Roman Law, the daughters and sons inherited equally. In regard to *inheritances*, then, the Roman Law was more just and equitable than either the Hebrew or feudal principles. Since the amelioration of the feudal system, and in the republican states of the American Union, the Roman principle, and the one also consistent with Christian equity, has been adopted. Sons and daughters inherit equally.

5. The Law of Consanguinity was the same in both the Hebrew and Feudal systems. In the Roman code, it was less strict.

The conclusion to be drawn from this comparison is, that the *moral principle* was far superior under the feudal system, while the *property principle* was more mild and humane under the Roman system. This was precisely what we might have inferred from the principles we had previously laid down. The high civilization of the Romans led them to form very just and accurate ideas of the law of property ; while their pagan religion was totally destitute of a moral standard of any kind, except what was suggested by the necessities of society.

Hence it was, that scarcely any people ever fell into greater depths of social corruption. For, the higher the civilization, where there is no moral principle, the greater is the temptation to vicious indulgence, and the greater the power and the certainty of pursuing it till corruption is followed by destruction. This was the career and destiny of Rome.

So also, where there was a moral principle, as in the Hebrew and Feudal systems, we should expect the laws and manners of a people, especially in respect to women, to become refined, milder, and more equitable, as nations progressed in arts, knowledge, and spiritual light. Such was the transition from the Hebrew domestic law to that of the Christian nations in the Feudal system. Arts had progressed, but still more had light increased by the revelation of the beautiful theory of moral life contained in the New Testament.

Whatever may be thought of the system of government, of military service, or of serf-dom in the feudal system of the Middle Ages, there can be no doubt it contained in its domestic life, a much hardier root, and purer growth of moral principle, than was found in its immediate predecessor, the civil system of Rome. Indeed, nothing can be more erroneous, than to infer purity of morals from a refined mode of life, or a refined system of laws. Did they contain such a principle in proportion to their refinement, neither Egypt, Athens or Rome had perished. In fact, however, their history remains a monument to the very opposite idea—that great refinement in arts and laws, rather aid, than ob-

struct the downfall of a nation, whose foundation is not truth in religion, and purity in manners.

Notwithstanding the general fact, that Christianity, even under the Feudal system, was more favorable to virtue, than any previous moral theory of paganism could possibly be ; yet, there were remarkable examples to the contrary. One of these occurred in the person of a woman distinguished for her beauty, for her brilliancy, and almost for her genius. This was the author of the Tribunal known among the knights and poets of her day, as the "Court of Love,"—*Cours d'Amour*, ELEANOR, daughter of William of Aquitaine, and wife of Henry the II. of England. She had so intimate a connection with some of the peculiarities of the Middle Ages, and was withal a person of such remarkable talents, that we shall glance a moment at her position and character.

Eleanor, by the will of her father, became the heiress of Aquitaine and Poitou, important provinces of what is now France. This was one of the peculiarities of the Feudal system, that occasionally in the absence of sons, the daughters became by will or otherwise, the heiresses of immense provinces, and, like young ladies who are heiresses at this day, not unfrequently the objects of the strenuous pursuit of fortune-hunters. In this way, too, they became the cause of civil wars.

While yet a small girl, her father, William of Aquitaine, seized by sincere repentance, or some eccentric phantasm, formed the determination to make a secret pilgrimage to Jerusalem, and there seclude himself from the

world. By pretending to be dead, he accomplished his plan. He went in disguise to Rome, returned to live a hermit on a mountain of Tuscany, and died twenty years afterwards, unknown to any except those to whom the secret was intrusted.[1]

At *thirteen years of age*, Eleanor of Aquitaine took possession of her dominions, and in a short time was married to Louis VII. of France, whose kingdom stood most in need of the addition of hers. Those were the days of the Crusades, and with Conrad of Germany, she and her husband Louis, departed for Palestine. There she met the renowned Saracen—Saladin. Young, beautiful and graceful, she attracted too much of Saladin's attention. Her husband carried her back to France, and jealous of her conduct, procured on the plea of affinity, a divorce. The divorce having been obtained on the plea of *affinity*, if good at all, by the ecclesiastical law made the marriage *null* from the beginning. The consequence of this was, that unexpectedly to Louis, her rights over her inheritance returned, and she had her provinces, as when she was single. The consequence of this divorce were momentous to the affairs of France and England; for, she married immediately Henry the II. of England; carrying to him her rights over the provinces of Aquitaine, and Poitou. She annexed the Feudal sovereignty of all the regions from the Loire to the Pyrenees, and the actual possession of her father's lands, towns and castles in Poitou to the English crown.[2]

[1] Turner's History of England, Vol. V. p. 261. [2] Idem, 262.

Character of Eleanor, Queen of Love.

This was in the Twelfth Century, and Eleanor, brought up in France, travelled in the East, elegant in person, and high in rank, became by her taste and patronage, the great reviver of the Provençal Poetry. She, and her daughter Maria, Countess of Champaigne, became the exciting cause and topics of its productions. She was thought to be the author of the Court of Love, to which the Troubadours, and many of the distinguished ladies of that period resorted. In these courts, she appears to have figured, in a character which might be called the Aspasia of Feudal Europe. The Court of Love was an assemblage of ladies of high rank, over which one of the highest rank presided.[1] Its jurisdiction was over cases and disputes in love, which were without the limits of virtuous and legal attachment. In fact, they presented a picture of respectable profligacy[2] among noble females, who aspired to honor, character and esteem! This may be taken as another example, that refined life, and virtuous life, are often different things.

This same Eleanor was, however, the queen who persecuted the "Fair Rosamond," for conduct which the Court of Love at least winked at! From this, the historian infers, that she lived long enough to feel and repent the folly and the wickedness of those licentious principles, which in her young and gay days, she had encouraged. It does not appear that the Court of Love, or its knights, the Troubadours, survived long. Theirs was a life of folly, of idleness, and of dangerous conse-

[1] Turner's Middle Ages, V. p. 264. [2] Idem, 275.

quences, not likely long to be tolerated. Many of the Troubadours turned monks, and endeavored to expiate, by penitential exercises, the errors of their youth.

From the character of the gay and beautiful Eleanor, we turn to one not less remarkable, nor less distinguished, though very opposite in every characteristic. This was the celebrated Pucelle, Maid of Orleans. We select her, not for her political acts, nor for that eccentric state of mind, which induced them; but, rather to show, which can be done accurately, the education and manner of life, which belonged to French small farmers in the Fifteenth Century. The extraordinary circumstances of her life were such social phenomena in the political history of the world, that very curious research has been made into her early education, habits and parentage. They were accurately ascertained, and enable us to know some of the manners and customs of that day.

Joan of Arc, as she was named, was the daughter of Jarres, and Isabel d'Arc, who were little farmers, poor, and living on a small portion of land, and the produce of a few cattle. She lived in a village where there was a church, and she was duly baptized. Her education was very simple. She learned the creed, her Ave Maria, and the Lord's Prayer, of her mother. She confessed to the Parish minister, and could sew and spin with great dexterity.[1] She was, as a peasant girl, active and industrious. She went with her father and

[1] Turner's England, II. p. 527.

brothers to their work, broke the clods of the earth, assisted to make hay, watched her father's sheep, led his cattle and horses, and at home spun hemp and wool. With all this education in matters of business and religion, she could never either read or write. We should remember, as to this, that many gentlemen and noblemen of her day, could read and write no better than herself.

Her mind was deeply cast in a religious mould. All her religious duties and observances were strictly, regularly and zealously attended to. This was in fact, the prime element of her life. She often sat apart, and was sometimes overheard uttering the simple prayers of a child. If, at the sound of a bell for worship, she could not leave the sheep to attend it, she fell on her knees in the meadow and breathed her devotions in the midst of her flock. She was gentle, kind and charitable. She was filled with a lofty, and unconquerable enthusiasm of spirit, and a patriotism which burned for the deliverance of her country. That deliverance she accomplished. She marched amidst victories, a hero, a general, a popular chief, till the object of all her enthusiasm, and her heroic efforts was attained. Her legitimate sovereign was crowned king of France in the ancient city of Rheims, and the English supremacy, which once threatened to be permanent, was forever destroyed on the soil of France.

Throughout this whole career, her manners retained their original simplicity. She remained pious, modest,

temperate and compassionate; when she had marched successfully at the head of battalions; manifested the full genius of command, and was adorned with the laurels of heroic fame. This remarkable person, who had enacted such a memorable part in history, lived so pure a life, and adopted such lofty principles of conduct, was at last *burned alive at the stake!* It was the disgrace of the English, and the opprobrium of the age.

The character and conduct of the Maid of Orleans have been accounted for, as a species of hallucination, that sort of *mono-mania* which consists in the exclusive occupation of the mind, by one idea, and the direction of all the spiritual energies to that object. Her object was to crown the dauphin king of France, and thus deliver her country from the dominion of a foreign power. Her mind received this direction, beyond a doubt, from the facts, that her country was devastated with civil war, and the respective parties the theme of constant conversation; that her mind was filled with the idea of religious veneration, and of the connection between the church, and legitimate sovereignty; and that thus the solemn duties of religion must be confirmed by the practice of equally important duties to the Royal Personage, whom she regarded as the religious and lawful head of her country. In the field, where she attended the flock, in the little church where she worshipped, and the solitary meditations of her mind, these ideas were nursed, till she became an enthusiast, and believed herself inspired to perform the mission, she actually accomplished.

For this purpose, she believed herself to have been directed by supernatural appearances; to have heard supernatural voices;[1] and to have been encouraged and commanded, by those angel visitants, whose abode is in heaven, while their errands of mercy include the circumference of created worlds. The numerous and diverse circumstances, under which she supposed herself to have seen these visitants; the great opportunities afforded by her life and conduct to have detected an imposture, and the fact, that none ever was detected; together with the solemn circumstances in life and at the approach of death, in which she made the declarations of her belief in these visions, all conspire to prove beyond the possibility of scepticism, that she was herself sincere, upright in her conduct, and filled with the belief, if not the reality, that her commission was supernatural, and her errands one applauded in heaven, and beneficent on earth. Speaking of her spiritual visitants, she said "Their forms were crowned with beautiful diadems, very rich, and very precious. I knew them, because they named themselves to me, when they saluted me." Speaking of Michael, accompanied by angels, she said, "I saw them, with my bodily eyes, as I see you. When they left me, I wept, and wished they had taken me with them."

Mr. Southey describes her state of mind thus:

"I sate in silence, musing on the days
To come, unheeding and unseeing all
Around me, in that dreaminess of thought

[1] Turner's England, Vol. II. p. 536—542.

When every bodily sense is as it slept,
And mind alone is wakeful: I have heard
Strange voices in the evening wind;—strange forms
Dimly discover'd, throng'd the twilight air.
The neighbors wonder'd at the sudden change,
And call'd me craz'd; and my dear uncle too
Would sit and gaze upon me wistfully,
A heaviness upon his aged brow,
And in his eye such trouble, that my heart
Sometimes misgave me. I had told him all
The mighty future laboring in my heart,
But that the hour methought not yet was come."

Such was the character of that peasant girl of France, who, at the age of twenty, had lived through a life of imagination, of mystery, of poetry, of action, of romance, patriotism and heroic conduct; had accomplished the object of her supposed supernatural instruction, and died a martyr-death. The lesson afforded by her life is, for some purposes, invaluable.

The *first* idea suggested is the prodigious and indefinite powers of the HUMAN MIND. Perhaps there is scarcely another character calculated (considering her sex, youth and ignorance) to give us more exalted ideas of the energy of soul. Impressed only by the impulses of the imagination, and sustained by the conscious integrity of her spirit, she accomplished great deeds, and inscribed them on an immortal page. Mr. Turner expresses this idea in a summary of the character of Joan, thus:

"The human mind possessing powers, which as yet seem unlimited, is capable of being excited to a degree and to an elevation at present indefinite. The soul

being alike in all, high birth or education is not essential to its susceptibilities. The greatest intellects have frequently emerged from the peasant's hut. Every station is capable of being acted upon, by the powerful impulses, which at intervals affect society, and to incalculable consequences. We cannot, beforehand, conceive the direction an impressed mind may take, nor the exertions to which it may be stimulated. From the most exalted disdain of self-considerations, to the keenest sensibility and endurance in behalf of another; from the slenderest touch of human sympathy to the sublimest wing of godlike aspiration; the soul may be influenced to achieve, or attempt, all that is possible on earth; to aim at all that is accessible in heaven. Nothing is too eminent for its desire, too lofty for its hope, or too remote for its pursuit."

The *second* thought suggested, by the character of the maid of Orleans, is the sublime strength and elevation given to the human spirit by the RELIGIOUS IDEA, when it has once seized full possession. It was this, and this alone, which had seized upon Joan, as was fully proved by the close examination of herself, her friends, and neighbors. All the testimony went to one point, that she was devout and religious, to a degree that admitted no rival in her affections. This idea was nursed in solitude and meditation, till her imagination became fired, and she associated with this devotion, her devotion to king and country. Whether the latter sprung out of the former, inspired by her supposed communications with heavenly visitants; or whether

they grew up together, is immaterial. She declared, and she acted on the belief, that nothing could sustain her but divine influence; that she was the special object of its favor; and that she was raised up to carry out plans of human government, which could be accomplished in no other way. This was the sublime belief, which led her to aspire to lofty objects, and gave her the strength to accomplish them. This was the sublime energy which soared above temporal considerations, overcame obstacles capable of withstanding any other impulse, and seized and directed, with the spirit of command, all common elements of power towards the object of its high desires. This energy, arising out of religious feeling and imagination, is sometimes called enthusiasm, sometimes fanaticism, and sometimes supposed to be a derangement of the intellect; but who can set limits to the human spirit? Who can say what is the real source of the affections? Who has analyzed the elements of the soul? The truth is, there are elements of power, and sympathies with the invisible world, in the spiritual constitution of human nature, of which we know not the extent, and in common life scarcely notice. These elements come out, and are suddenly developed, by some invisible exciting cause, and of that we know as little. It may be the providence of God shaping events to that ultimate end, which he has predestined. It is certain there is very much, in the action and results of human life, with which mere free agency has had little to do.

Again, some will say, as in the case of the Maid of

Orleans, that a strange hallucination of the intellect, caused by an inflamed imagination, was the source of her energy, as we often see in confirmed lunatics an extraordinary development of physical power. But has lunacy ever actually increased the powers and energy of the mind? Strange vagaries and much cunning lunatics have; but neither the powers of reason nor imagination (except as to their peculiar fancies) seem ever to have been increased. On what principle could we suppose mere disease ever to have strengthened the intellect?

Again, others suppose that there are some persons *born* into the world with something which they call *genius*, and which is something the world in general has not got. A certain amount of constitutional energy greater than that of others, which aids the growth of the intellect, and which even gives greater vigor to the vital principle, some persons undoubtedly have. But if it be meant that they have any peculiar powers of mind, or any power of development not common to the human race, history and observation do not sustain the theory. Nothing in metaphysics can be more certain, than that the human mind is *homogeneous* in its faculties, its desires, its sympathies, and all those qualities which are essential to spirit. When, therefore, any one of the human species develops in an extraordinary degree any of the passions or the intellectual functions, it does not prove that that passion or function does not exist, or might not be developed in others; but only that the exciting cause or attraction, whether internal or external, had not been

Mind homogeneous.

applied to them. The dormant elements of mind exist in all; with greater constitutional energy, it may be, in some; but certainly ready to be awaked, aroused and developed, to an indefinite extent, in all spiritual beings, when the sufficient power of attraction and excitement shall operate upon them.

Of this power of excitement, the *religious idea* is unquestionably the strongest, and for a very obvious reason. It is the only one which goes to the *ultimate elements* and seizes upon the immortal principle. It is the only one which professes to deal with invisible agencies, to extend to invisible worlds, and exercise its power over regions of being beyond the limits of this life, and this world. The only Power whose jurisdiction is acknowledged, is the sublimest Being, and the most excellent character in the universe. Hence it is that the religious idea, when it has once seized upon the soul, gathers around it the most sublime objects of human contemplation, rouses up those dormant powers which perhaps were never before visible; fires them with the hopes of the most brilliant imagination, and thus produces results which were not supposed possible, and which fill, even ages after, those who have not partaken of the same spirit, with astonishment and with a sort of belief that the actors must have possessed some extraordinary and peculiar powers of mind. The effects of this enthusiasm or fanaticism, as many fain would have it, is not very different, whether manifested in the monk-reformer Luther, or the woman-hero Joan. In either, as in every other example of the same kind,

it believes in supernatural influences, trusts to divine power to attain its ends, marches forward with inflexible faith, is undaunted by any terrors, and manifests a greatness of soul which rises above all common objects, and is superior to all common influences.

The next idea suggested, by the character and achievements of Joan of Arc, is that MIND HAS NO SEX. The idea that it has, has arisen from the custom of mankind in educating women solely for *domestic occupations*. That there are physical differences of constitution; that these physical differences suggest peculiar duties; and that the Bible encourages and directs to the performance of these duties, are certain and obvious facts. But does it follow, from either or all of these facts, that the human soul is *not homogeneous*? that it is one thing in a man, and another in a woman? If it be essentially different in one from that of the other, and woman be the inferior being, then Mahomet reasoned logically in doubting her admission to the abodes of glory and the enjoyments of paradise. The Christian view of the human constitution is, however, widely different. It assumes throughout the whole history of facts and their relations, recorded in the Bible, that *there is no sex in spiritual being*. It assumes this by declaring, 1. That they originated in the same parentage; 2. That they have the same flesh and blood; 3. That they have the same affections of heart and intellect, to which the same appeals are made, and for which the same moral commandments are given; 4. It directs them to the same immortality, points out the

same way, and inspires them with the same hopes and fears. In fine, as to all which concerns the spiritual being, no difference whatever is made between the sexes. Observation on human conduct and history declares the same principle. It is true, that the differences between the intellectual education of men and that of women, afford very little opportunity of drawing comparisons. There is enough, however, known to test the principle and establish it, that there is no inferiority of intellectual dispositions and faculties in women.

This fact might be illustrated by numerous historical examples; but they would perhaps fail of convincing those minds, if any there be, who have remained insensible to the proofs afforded by reason and nature. Mankind, placed in superior condition, have ever proved themselves incapable of being convinced that those who were inferior to themselves in strength, station, wealth, or association, *could*, by any means, be raised to an equality. A man born to rank or wealth has an instinctive propensity, in spite of all reasoning to the contrary, to believe that he actually possesses some qualities of mind or character, which his inferiors do not possess, and cannot attain. A nation in a high state of civilization, believes this of weaker, and more uncultivated people; and it is not surprising that a sex should adopt it towards one inferior in natural strength of body. So far as it applies only to strength and functions of body, it is right so to believe; for that strength and those functions are really different. But this inequality does not extend to the intellectual or spiritual functions.

Men recognize this fact in some things, but not in others. They are careful to demand a purer morality of women than from men ; while they demand less from the intellect. They *practically* admit the spiritual equality of women, but they are willing that their powers of mind should be less cultivated ! There is, in all this, an obvious disproportion. Things, in education and in society, are adapted to the *existing condition*, rather than what that condition *ought* to be. In this, however, women have only shared the common fate of all the social elements ; for what one of all the practical principles of society, which might not be improved ?

I said, however, that there were examples to show that there was no intellectual inferiority in women. Mr. Turner, in his History of the Middle Ages, has this remark :[1]

" It is impossible to read the long catalogues of the Arabian treatises on astronomy, optics, geometry, arithmetic, medicine, natural history, chemistry, and even on music, logic and metaphysics, as well as on poetry and grammar, without astonishment at their unwearied assiduity and successful progress. We are but yet beginning to be adequately acquainted with them ; nor is it the least singular fact of this animated race—this important though wild branch of the stock of Abraham—that their ladies in Spain were distinguished for their love of letters and knowledge."

Mr. Turner has added, in a note, the following list of Spanish-Arabian women, who were distinguished for

[1] Turner's Middle Ages, Vol. IV. p. 370.

their literary acquisitions. Their names are now unknown to fame; but the subjects on which they wrote afford an apt illustration of the genius of the sex. It will be observed that they flourished in the 10th, 11th, and 12th centuries, a period when our Anglo-Saxon race had certainly shed no great light upon the world. Fatima of Hispali studied jurisprudence at Corduba; died 941. Fatima of Hispali, with her brother, wrote on legal institutions and the history of her times.

Mazana of Corduba; died 980.

Labana of Corduba; in poetry, arithmetic and philosophy; died 996.

Aischa Bent; in poetry and oratory, at Cordova; died 1022.

Sophia of Hispali; in poetry and oratory; died 1039.

Maria; in poetry and erudition; died 1033.

Rodhia of Corduba; wrote many volumes on the art of oratory; died 1041.

Fatima of Corduba; wrote many volumes, and was very learned; died 1041.

Valada, daughter of the king of Corduba; shone in literature; died 1106.

Algasania of Hispali; an orator and poet.

Thoma of Valentia; was greatly skilled in grammar and jurisprudence; died 1128.

Maria of Grenada; in learning and music; died 1166.

Mohgia of Grenada; in poetry.

Mozada of Grenada; in history; died 1215.

Leela of the same; in learning.

The writer who has preserved these names states that there are many others of the same description, who adorned the annals of Arabian learning.

By this catalogue it appears that the Arabian women did not feel themselves excluded from the walks of poetry, music, oratory, history, grammar, or jurisprudence. Most of these subjects are those in which we should suppose the more refined taste and brilliant fancy of women would delight to dwell. It is enough, however, to know that in those ages we are accustomed to call "the dark," and under those governments we have supposed to have only a barbarous glory, and to be impelled only by the sensual spirit of Mohammedanism, the FEMALE MIND had attained no common success in the walks of literature, and may even be supposed to have communicated some sparks to that fire of genius which accompanied the revival of learning in Christian Europe.

I have now fulfilled my intention of tracing, in this Introduction, the civil relations of women, in their main features, as they existed under the laws of the Hebrews, the Romans, and the Feudal System of England. It may serve as a foundation on which to build some knowledge of the legal relations of women as they exist in our American and republican society. Unless I am greatly mistaken, my readers have already found conclusive evidence of that *gradual but certain progress* in the amelioration of the social condition which was distinctly stated, in the commencement of this essay, as the law of human improvement. If this be true,

then it furnishes the highest evidence and the brightest prospect of that final restoration of human society to its original beauty and intended excellence which can be furnished, except in those glowing declarations of prophecy which lead the mind forward to some future glory of the human race. If we look back through the facts of history, produced and compared in these pages, we find that women have made three immense improvements in their condition; improvements as great, if not greater, than any made by any other portion of the human family. They have shared in all the improvements made by men, and they have had some peculiar to themselves.

The three greatest elements in human condition, as it regards the civil laws, are the regulation of personal liberty, of marriage, and of property. If these be rightly regulated, it is scarcely possible that human laws can do any more for the happiness of individuals. It is in these very particulars that women have, in Christian countries, made such vast progress, especially in our republican government. 1. We have seen, that the *law of servitude* existed even in the Hebrew commonwealth. So deep was the degradation of all nations in this particular, that not even the peculiar nation of the Jews escaped. They shared in the barbarian codes of war, common then to all nations. The prisoner taken in war was a slave, and all the consequences of human slavery followed in the train of that fact, as it now does in the wars of Africa. Connected with this was the right of the father to sell his daughter in marriage.

Connected with this also was the right of the master to make a concubine of his female slave. There was an end, therefore, of a free choice, a free mind, and a free action, in women. Contrast this with the condition of a Christian woman in the United States at the present day! Except in a very youthful non-age, they are, as to the control of men, absolutely free. Their fathers cannot sell them. No man can constrain their personal liberty. They are accountable only to those general laws which regulate society. I do not speak of the colored slaves in the United States, who occupy an anomalous condition in the world, although it is very obvious, even their condition is ameliorated by the causes which have ameliorated the condition of others. I speak of those women who compose a part of the *citizen population* of any Christian country.

2. At the period to which we refer, polygamy, or the having of more wives than one, was an allowed *legal condition* of the most refined nations. It was allowed even among the Hebrews. Now, no Christian nation or society allows this practice. It is against the laws of every Christian state; and if these laws are violated, the criminal law deems the offence one of the darkest in the criminal code. Here is another vast step in the improvement of women. It is no matter how little polygamy may have been practised, its legal existence tended directly to degrade the female sex; as we see proved in all Mohammedan countries. Now wives are compelled to assume the care and responsibility of an equal share in the government of a family; a fact

which has had great effect in carrying forward the European civilization.

3. Another vast element, influencing the character and dignity of women, is the law distributing inheritances. We have seen, that under the Hebrew and the feudal systems, women had *no landed inheritance*, except when there were no sons; an exception which seldom occurs. Now, in the United States, women have equal inheritances, in both lands and personalties; a fact which places them, as to inheritances, in the same condition as men. If there are inequalities as to property, in the married state, an apologist for the existing state of things may very reasonably say, that it is an inequality depending on the free will of women themselves. If they do not choose to avoid marriage, the laws still allow them to make a *settlement on trustees for their own separate use.* This point we leave to the chapter on husband and wife.

There are, doubtless, amendments of the laws of property, in relation to the wife's control over her own property, its release from the debts of the husband, her capacity for separate business, and her rights of dower, which may and ought to be made. There is, at this time, very little doubt, that from the tendency of public opinion and the general progress of liberal principles, all such amendments in the law as seem really to promise any social improvement, will be made. The reader will see in the following pages, detailing the laws of the United States in relation to women, how great has been the improvement in the laws of *inheritances*

already made, an improvement which has done more to equalize the people of the United States than any other legal measure could have done. It must be recollected also, that this was an improvement which did not necessarily follow either the establishment of our national independence, or the formation of our constitution. Both those events left the municipal laws, which regard property, as they found them. It was the general effect of the principle of liberty, acting on the people, and through them on the statute legislatures, which abolished everywhere in the United States the feudal principles of inheritance.

It may be asked, what now remains to improve the condition of women? In my opinion it consists chiefly in two things: 1. In an improved EDUCATION; and 2. in enlarging the circle of EMPLOYMENTS for laboring women. As to the first point, it is desirable that they should be educated for three purposes. 1. That they should, as *mothers*, be the fit TEACHERS of infant men. 2. That they should be the fit teachers of AMERICAN men; and 3. That they should be the fit teachers of CHRISTIAN American men. Almost the whole of this kind of education is comprised in a single direction: that they should undergo such discipline of mind and affections as to learn *to think, and think rightly.* The power of thinking, and the disposition to control that power towards right ends, is the highest result to which any education, however elaborate, can arrive. That this power is not identical with mere knowledge is sufficiently proved, by the number of men of learning,

without what the world calls sound sense; and the number of women with elegant accomplishments, without thought. That when possessed, it is not always accompanied with those peaceful and virtuous dispositions which our holy religion teaches, is equally proved by the long array of brilliant men and illustrious women, whose lives have afforded no example of good to mankind, and to whom no historian would point to illustrate any other idea than the too frequent success of talent without principle, and distinction without virtue.

Had the *mothers* of mankind been taught to *think rightly*, these examples of perverted intellect and injurious success would either not have occurred at all, or occurred only as sparse and spared monuments to the frailty of human nature.

As to the second point, a greater *variety of employments* for laboring women, the observation of most intelligent persons concurs in admitting its necessity. The limitation of employments, among thousands of poor women, to the vocations of the family or the needle, occasions too great a competition for those labors, depreciates the price of their labor, makes them dependent upon men upon whom they ought not to depend, and finally causes no small share of all the real suffering and poverty which society experiences. There is no need of the limitation of women to so narrow a circle of employments; because there is a vast amount of sedentary occupation, in which men of full health and strength are now employed, and which women could do equally well, and with more propriety.

I pass over these topics, however, with this glance at

their importance, because they do not properly belong to a work, whose main object is a description of *the legal relations of women.* In leaving this essay for that field of inquiry, I must congratulate every daughter of men, upon the vast amelioration in the condition of her sex produced by the Christian dispensation; especially for that modification of laws which exists in the United States; and yet more for that delightful prospect of Christianity accomplished among men, which seems drawing rapidly near; at least, that reason, and Scripture, and experience all unite in indicating some grand CRISIS in the affairs of the human race; from which newer, better, and more beautiful forms of human society will be evolved. *What* they will be, we may not now know; but it is impossible to believe that for two thousand years the principles of Christianity have been gradually extending the circle of their influence; that governments, founded on right have been increasing and are better understood; and that the arts have been multiplying in number and power, till they have advanced beyond the limits of prior imagination; and yet there shall follow no great results to human happiness; that women shall not partake the general elevation; that want shall not be alleviated; and that suffering shall remain undiminished! We look to a far different picture, painted by the pen of prophets and evangelists in ages past; to a time not far distant, when the electric current which is about to encircle the earth with a cordon of instantaneous intelligence shall be a type of that flow of sympathies, charities and instructions, poured through the brotherhood of man, by CHRISTIAN LOVE.

CHAPTER I.

LAW GENERAL.

(1) In discussing the law relating to women, it is necessary, in the first place, to lay down the general elements of law, in its comprehensive sense, including its application to all persons of whatever degree or condition. For, it is obvious, there must be some general principles, which concern the whole of society.

(2) Law is defined, by Blackstone, to be a rule of action,[1] whether of animate or inanimate, rational or irrational bodies. On the world of matter, as well as that of mind, of unreasoning creatures as well as that of intellectual beings, this rule, in respect to constitutional organization, was impressed in the work of creation, by God the Almighty Father. It was in this general sense that Hooker, at the close of the first book of Ecclesiastical Polity,[2] bursts forth into this sublime expression: "Of law no less can be acknowledged, than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempt from her power: both angels and men, and creatures of what condition soever, though each in different sort and manner, yet all with uniform

[1] 1 Blackstone, 38.

[2] Hooker, Ecclesiastical Polity, Bk. 1. ch. 16. § 1.

consent, admiring her as the mother of their peace and joy."

Law, in its universal sense, is therefore a vital element of organized being. Without it, creation and each of its creatures would fall into ruins, as complete as those of the body when life itself departs.

(3) This general or constitutional law is the law which God impressed upon creation and its creatures, when man was formed an intelligent and responsible being. It was a wise and sufficient law, as reason readily admits, when contemplating the exactness and the perfectness, with which the orbs of the universe keep their places, the sun imparts its warmth, the earth gives forth its fruit, the animals obey their instincts, and man himself holds dominion by the exercise of mind.

(4) From this law of God, man, through temptation, departed, and by this departure made the necessity for a new law or revelation. In the language of Milton,[1]

> "Earth felt the wound; and nature, from her seat,
> Sighing through all her works, gave signs of woe."

To correct the evils of this departure, and make a new regulation for the actions of men, God gave his Revelation, a moral law, contained in the books of the Old and New Testaments.

(5) But this moral law, applying itself only to the conscience, was insufficient to restrain the actions of men in a state of society, when they disobeyed this moral law, or when it was necessary for that society to act in its

[1] Paradise Lost, Bk. 9. line 782.

collective capacity. Hence men in a state of society made laws of their own to govern : 1. The action of the society itself, in its collective capacity ; and 2. The actions of men either towards the common society or towards each other. This body of human laws is called the civil law, as it is the law or rule of a civil or organized community, made by that community to govern itself and each of its members.

(6) It appears, then, that there are three codes of law for the government of human beings. 1. There is the NATURAL LAW, impressed by God, at the creation, upon all organized beings, intelligent and unintelligent. By this natural law is meant the constitutional order, the constitutional powers, and the constitutional tendencies, the instinct and the reason of natural beings, of whatever kind. 2. There is the REVEALED LAW of God, contained in the Scriptures of the Old and New Testaments. This was given to man after his disobedience, to reclaim and restore him to his lost position, by moral means. It acts on the conscience. 3. The CIVIL LAW, which is the law of man himself, to govern him in a state of society. This cannot act on the conscience, but does act on the person and property of each member of the society.

(7) All laws must have SANCTIONS, without which they would not be laws. The sanction of a law is the power or authority to make and enforce it. The sanction of the natural law, then, is the power and will of God, who is the Creator of nature. As he governs according to his will, so he punishes according to his

will. In the common and fixed natural laws, the punishment accompanies the act of violation. This is obvious enough in relation to such laws as those of gravitation, nutrition, and similar ones. But it is also said, by physiologists, that there is no law of the animal economy which can be violated without being accompanied by bodily punishment. The revealed law has also the sanction of divine authority and power. The mode of enforcing it, however, is different. It is applied to the conscience, and the punishment for its violation is moral and future. Civil or human law has also its sanction. It is the power of the society, which makes it, to enforce it by human punishment. This is the foundation of the criminal law, and the administration of justice, by human tribunals. It is true, that the civil law, when not in direct violation of the law of God, has also the sanction of the revealed law; for the latter recognizes, explicitly, the former, as a part of the social organization, and commands obedience to it. This sanction, however, does not reach the persons of men in society, and hence the necessity for criminal punishments. Each of these species of laws has its own peculiar sanction. The one punishes its violation by its own organization. One acts upon the conscience, and punishes through future retribution. The last acts through human tribunals.

(8) Laws, then, are divided into these three general kinds. 1. The natural law. 2. The revealed law. 3. The civil law. Each of these laws applies, in some general particulars, in precisely the same manner to

women as to men. Hence it is necessary, in considering the subject of law, applied to women methodically, to consider it in this order.

1. To consider those general principles which apply in the same manner to women as to men.

2. To consider those laws and relations in which the legal condition of women is different from that of men; and herein:

1) Marriage.
2) Divorce.
3) The legal condition of wives.
4) The legal relation of mother and children.
5) The relation of masters and servants.
6) Of guardian and ward.

CHAPTER II.

LAWS COMMON TO WOMEN AND MEN.

SECTION I.

(9) In laws common to women and men, are plainly included the whole body of what is called natural law, international law, and personal protection, which in their very nature can have no distinction of sex, condition, or person, but apply to men and women as human beings. These laws refer themselves to the standard of human reason and to the sanction of the prevalent species of civilization, rather than to any fixed and particular statute law. They have varied, therefore, with the various kinds of moral and intellectual development in various epochs of human progress. This may be particularly illustrated, by the various laws prevalent in regard to prisoners taken captive in war, and which included, of course, women and children as well as warrior-men. Thus among the Hebrews, the prisoners were subjected to servitude, and to more cruel treatment than others in similar condition.[1] Among the Romans, the power of life and death was exercised over the captives. Tens of thousands were destroyed when prisoners, and millions of others reduced to the most cruel slavery. Among all barbarous nations the same

[1] Josh. 29: 27.

cruel practices are continued, as we have melancholy evidence in the domestic wars of the African tribes, and the millions of degraded slaves which are the victims of those wars. Charlemagne deprived the Saxons of liberty and property.[1] But his successes gradually softened the law of captives; and now, among all Christian nations, prisoners of war have the same individual rights of person and property, as other individuals in civil society. In this amelioration of the law of nations, women have even a larger share of advantage than accrues to men; for upon them, in person, property, and affection, the evils of barbarian war fell most heavily. This is one of the strong illustrations of the manner in which the great law of nations and of nature is modified and improved, by the progress of society in the social arts, and especially by the adoption of the Christian code of morals, as the rule of life and manners.

(10) The NATURAL LAW, then, is one of those classes of laws which apply to women in the same manner as men; for, by the reason of things, out of which the law of nature is supposed to arise, there is no distinction between the general rights of person or property, as attached to women or to men. For example, if the ship *Columbia*, under the flag of the American nation, be captured on the high seas, in time of peace, by the vessel of a foreign nation, and having on board the property of Eliza and Jane, as well as that of John and James, this property of Eliza and Jane is as much entitled to the protection of the United States' government, as that

[1] Montesquieu's Spirit of Laws, Bk. 10. ch. 3.

of John and James. Eliza, Jane, John, and James are all regarded as so many *persons*, without distinction of sex or age, who are members of the American nation, and whom the government of that nation has, by the laws of nations, a right, and is in duty bound, to protect.[1]

This natural law, however, is practically included in two great branches of what may properly be called the civil law, i. e. the established law of states in civil society. These two branches are the international and the national laws. Both of these we shall very briefly consider, in their relation to women. Men never actually lived in what is called a state of nature; that is, disconnected, in perfect equality, and without government. Therefore, we must refer to the practice of nations in civil society, and their relations with one another, for what is commonly called the Natural Law.

SECTION II.

(11) The REVEALED LAW is also another of the great branches of legal authority, which applies equally to women and men. It is true, that revelation does not consider men and women on a perfect *level*, in a state of society, as we may learn by several precepts of the New Testament. But the revealed law is a moral law, which is *equally applicable and equally obligatory upon* every individual of the human race; because it announces two great facts, which necessarily make it so.

[1] United States' Constitution—Preamble.

A Civil Society—what.

1. That every being was created by, and depends upon, one God, who, as the Creator and the Father, both reason and conscience acknowledge as possessed of all claim to obedience and regard. 2. That all human beings were created of one flesh and blood, and therefore are members of a common brotherhood, having a common right to dwell together on the earth. From the first of these facts is derived the authority and power of the revealed law; and from the second, its equal application to every human soul, whether it be to restrain or to enlarge, whether for discipline, instruction, or power.

(12) The revealed law is, therefore, no respecter of persons; and every command of the decalogue applies, with equal force, to both men and women. For example, the commands not to kill, not to commit adultery, and not to bear false witness against a neighbor, are equally applicable to both men and women.

SECTION III.

THE CIVIL LAW—DEFINITIONS.

(13) Under this head, we shall consider only such parts of the civil law as have equal application to men and women. In the first place, we must *define* certain terms, in general use among all intelligent persons, relating to civil law, but which are used in various and sometimes erroneous senses.

(14) A CIVIL SOCIETY[1] (or, as sometimes called, a

[1] Rutherforth's Institutes, Bk. 1, ch. 1.—Sect. 11. *ibid.* Bk. 2, ch. 2. § 1

state) is a complete assembly of persons who, in possession of their liberties, have united themselves into one body, for the purpose of securing their rights and promoting a common interest. It is rare that an example can be found, in history, of a society which was thus voluntarily and purposely constituted in the beginning. For nearly all civilized nations have come together, in their origin, without purpose, by a series of providential arrangements, independent of their forethought. Their governments have generally been arbitrary monarchies or aristocracies, forms of government which have obviously grown out of the patriarchal or military condition of the primitive people. The nations, however, who have such governments, are supposed to adopt them by choice, because they assent to them, in practice, when they might change them. There are examples, however, of States whose people have come together deliberately, and by compact instituted their government and laws. The United States furnish the most conspicuous and perfect of those examples. The first settlers of Massachusetts, when just landed on its shores, made a serious, public, and written frame of government, by which they "mutually, in the presence of God and of one another, covenanted and combined themselves together into a civil body politic."[1] This practice has been followed by each one of the present States of the American Union; and finally, in combining them all in a general contract of government, called

[1] De Tocqueville's Democracy, Vol. I. p. 31.

the American constitution. This Union and each separate State are all examples of civil society constituted according to the terms of our definition.

(15) Civil power is the power which this civil society, by this mutual compact, agrees to exercise for the common benefit, over individuals, or in relation to other states.[1] These conclusions flow from this definition. 1. That this power, according to the contract, is sanctioned and enforced by the whole power, physical and moral, of the community which has made the agreement. It is on this principle that the sheriff or other civil officer, when resisted, has, by our common law, a right to call on all the individuals of the community to assist him; or, in common language, to call out the *posse*. 2. It also follows, that if the persons who exercise this power go beyond the terms of the contract of civil society, their authority is void, and the authority of that society no longer sanctions its exercise.

(16) Civil constitution is the established form of exercising the supreme or governing power within a nation,[2] according to the compact agreed upon. In the United States it is the *expression* of that compact itself. It is the definition of the civil power, granted to the several functionaries of government, and of the *manner* in which they shall exercise it.

(17) Civil Law, or as it is frequently called, Municipal Law, is the law which a civil society, constituted as above described, prescribes for the government of itself,

[1] Rutherforth's Institutes, Bk. 2. ch. 3. § 1.

[2] Ibid. Bk. 2. ch. 4. § 3.

and its members.[1] It is defined, by Blackstone, to be "A rule of civil conduct, prescribed by the supreme power in a State, commending what is right, and prohibiting what is wrong."[2]

(18) RIGHT is a term of universal use in moral and legal discussion. It is a term, however, so differently understood by different individuals, that while they agree upon the *principle* of doing right, they very frequently disagree as to what *is* right. This difficulty arises from the fact that they mistake their own *perceptions* of right, for the standard. As these perceptions, however, are formed by imperfect faculties and imperfect consciences, it follows that they cannot constitute a standard of absolute right and wrong. What then is *right?* Grotius defined it as a quality in a person which makes it just or right for him either to possess certain things or do certain actions. But it has been justly objected to this definition, that it expresses only the effect of right, and not what right is. What makes our actions or our possessions *just?* Our actions, says a writer of authority, are just when they are consistent with law. According to our previous definition of the different species of law, this principle is correct. For God, whose infinite wisdom and power has made all things, is the only ultimate lawgiver. He made nature; he gave revelation; and he permits, and within its own limits, sanctions human law. Each of these laws, then, is, within its own sphere, the standard of right. The fact that a civil law is erroneous, does not deprive it of

[1] Rutherforth, Bk. 1. ch. 1. § 2. [2] Blk. Comm. p. 44.

authority; for the nation, by whose compact it is law, may change it; and, within the sphere of persons and property, it is the only standard. The RIGHT of any person to do an action, or possess a thing, is nothing more than the power to do that action, or possess that thing, consistently with law.[1]

(19) It is sometimes sought to oppose *moral* right to *legal* right; or, in other words, *revealed* law to *human* law; for all human laws, made by a civil society, are moral laws, if made within the limits of its authority, and upon subjects which human laws concern. It is only when there is some supposed discrepancy between the revealed law and the human law, that any such opposition can arise. But this opposition cannot arise where the human law does not depart from the obvious jurisdiction of a compact of civil society. The authorities of the two systems of law act by different means and for different objects. The revealed law acts on the conscience to reform the spirit. The human law acts on the person, to guide and restrain outward action. Between these two spheres of law there is not, in reason, any opposition. Thus the revealed law commands Jane not to take the property of Eliza. But what *is* the property of Eliza is determined by the human law. The revealed law does not define what is or is not property, or in what mode it shall be held. It recognizes that there may be separate property, but leaves to civil society to determine its title, tenure and continuance. The only exclusive jurisdiction of revealed law

[1] Rutherforth, Bk. 1. ch. 2. § 3.

is over the conscience; and within that jurisdiction civil society has no power, by virtue of its origin, its reason or compact, to enter. Hence the wisdom of that provision of the United States' constitution which prohibits any interference of the civil power with the rights of conscience.[1]

Within its own sphere the civil law is regarded as obligatory, by the revealed law itself; but when it interferes with faith and worship, the great provinces of conscience, then the revealed law considers that interference void. Examples strictly illustrating these principles, may be found in the New Testament. Christ laid down the precept, "Render unto Caesar the things that are Caesar's, and unto God the things that are God's;" paying a tax himself to a pagan government,[2] because laying taxes was within the just jurisdiction of civil government, no matter in what form that government may be constituted. On the other hand, when the apostles were forbidden to exercise the rights of conscience, by the worship of the true God and his Son, their Saviour, they resisted the law unto death, and became martyrs to truth and liberty. This conduct of Christ and his apostles defines, most accurately, the line within which there can be no opposition between the human and the revealed law. That line is the one which comprehends all the business and relations of civil society, and beyond which lies the domain of religion and conscience.

(20) Property is another of those terms in universal

[1] U. S. Constitution, Amendment 1.

[2] Matt. 22: 21.

use, and which is one of the chief objects of human laws. This term is derived from the Latin word *proprius*, which signifies *peculiar to self*, belonging to one, and not to another. Property is defined to be *such an exclusive right to things* as excludes *all the rest of the species* from having anything to do with them.[1] It is not certain that this idea of property was original in the first constitution of human society. It rather seems to have arisen, like many other institutions of a social kind, from the necessity for provisions against those evils which mankind, by the errors of their conduct, had voluntarily brought upon themselves. However that may be, separate property came to exist and be acknowledged immediately after the flood. The isles of the Gentiles were divided among the descendants of Javan, and some after property, as we now define it, was understood and practised upon among the primitive nations. This separate and exclusive right is also recognized in the revealed commandments, and is enforced by the laws of all civilized nations.

(21) Civil liberty, is as much liberty as is consistent with the obligation of the social compact.[2] This term *liberty* is understood in very different senses. Some understand it as synonymous with a right to do as one pleases. Others think, that as it should consist with law, no act of government, however arbitrary, should be resisted. Neither of these are correct; for, in a society like that of the United States, where law is the result of a defined civil compact, there is no right to do

[1] Rutherforth, Bk. 1. ch. 3. § 1. [2] Rutherforth, Bk. 2. ch. 8. § 8.

anything against the laws of that compact, and there is no right to enforce anything beyond the boundaries of that compact. As much liberty, then, as is exactly consistent with that compact, the members of society may enjoy; but nothing which does not consist with it. There is no such thing as absolute liberty, in a state of civilization; for in that condition, there is a compact of civil society; and by that contract, its members agree to give up a portion of their individual natural liberty, that they may enjoy the protection and advantages of a common government.

(22) THE RIGHT OF PROPERTY is that right which is, more than any other, the subject of legal action, and which requires to be distinctly understood in the common transactions of mankind. What *is* a right of property? A *right in things* we have already defined (18) to be the power to possess them according to law; and *property* we have defined (20) to be an exclusive right to things. The right of property in things, then, is *the exclusive right to possess those things, in conformity to law.* As the civil law acts upon, regulates and prescribes the transfer of property, it follows, that the rights of property, in a state of civil society, are really the creatures of the civil law. By this we mean, that there are no rights of property held by any supposed natural claim, which in a state of civil society can be upheld against the civil law. For example, the civil law requires that for a child to inherit the property of its father, the mother and father must have been married previous to its birth.[1] For the mar-

[1] 2 Blackst. p. 247.

riage is the only mode of ascertaining the legitimacy of the child. Suppose then that Jane is known to be, and acknowledged as, the daughter of John, but born *before* the marriage of the parents; and that Eliza is also a child born *after* their marriage. The natural right of these children to the property of their father would seem to be equal; but Eliza, by law, inherits the whole property, and Jane cannot assert her natural right in opposition to the rights of Eliza, held by the civil law. The rights of property, then, in civil society, are held by, and dependent upon, the civil law.

(23) THE RIGHTS OF PERSONS are not so extensive; but are in fact a much more important branch of rights; for rights of property are a consequence of, and altogether inferior to, the rights of persons. Rights of persons are, in their very nature, of a different kind and definition, from rights of property. Rights of persons are not rights in a thing; nor are they exclusive. They rather correspond to duties; for, that right of person, whatever it may be, which Eliza has, Jane has also, and it is a duty in each to grant to the other. Thus the highest right of person is the right to life; but Jane has as much right to life as Eliza; and both are under the greatest obligations of duty to regard and grant it in the other.

The most important rights of persons are those mentioned in the Declaration of Independence, viz. life, liberty and the pursuit of happiness. Even these, however, the most indisputable and absolute of all rights, cannot be said, in a state of society, to be held in a

universal and unqualified sense; for society asserts and maintains its right to take away life, as a punishment for crime; to restrain liberty, for the same cause; and to prohibit the pursuit of happiness, in any way which is inconsistent with the happiness of others; as, for example, the pursuit of a business which is noxious to the health or injurious to the property of others.

(24) These rights of person and rights of property we shall consider, in a more special manner, in the following sections; in which will be pointed out all those general principles of political and municipal law, which are of universal application, and consequently as important to women as to men. Of such a character are all those rights and securities which are guarantied by the political law, and enforced by the municipal courts, as belonging to the members of society as persons or human beings, and not merely as men, as officers, or as electors. In this respect, the rights and blessings secured by the American constitution of government are conferred equally. They are not confined to station, sex or age.

SECTION IV.

POLITICAL RIGHTS.

(25) A Civil Society, we have defined (14) as a complete assembly of persons, who in possession of their liberties, have united themselves into one body for the purpose of securing their rights, and promoting a common interest. *Who*, according to this definition, in a

given measure, as the people of the United States, compose this society and are its members? The answer is, *all free persons, who were either parties to the compact in its origin, or were born into it subsequently, or united to it by an act of national law.* This includes all persons of *every age, sex, condition, color, or birth,* except only, *slaves and aliens;* the former, because they could give no assent, even by implication, to a national compact; and the latter, because they are members of a foreign State, and it is inconsistent with national sovereignty, that its members should owe allegiance to another State.

(26) WOMEN, then, as well as men, and children of all ages, as well as women, are members of civil society. When native born, they are *citizens*, and entitled to all the benefits, and the protection of that society. In the enumeration of the census, taken under the Constitution of the United States, they are enumerated, and constitute the basis of taxation and representation.[1] Indeed, women and children compose three fourths of the whole white population. Society is formed by them and for them, quite as much as for men.

(27) A CITIZEN is one born in a country, or united to its society, by an act of the national law, called naturalization.[2] They who are thus born into a civil society, or adopted into it by naturalization, owe that society *allegiance*, and the society owes them *protection.* The right to protection and the right to allegiance are

[1] U. S. Constitution, Art. 1. Sect. 2.

[2] Constitution, Art. 1. Sect. 8. par. 4.

reciprocal rights, and require reciprocal duties on the part of the citizen, and the government. The general *duties* required of the citizen are, 1. A contribution, in the payment of taxes, to the support of officers of the government; and 2. A contribution of means or force, to the defence of the country in time of war; and 3. A support by countenance, or strength, to the administration of justice, in the suppression of crime and vice, or the prevention of unlawful acts. The general duties required of government are, 1. To protect the citizens, in person or property, against foreign force; 2. To protect them against domestic crime, or violence; and 3. To perform such acts and benefits, as can be better performed by the government, than by individuals.

These reciprocal rights and duties are as much the rights and duties of women, as of any other members of society. Thus if Jane owns a farm,or a lot of ground, it is as much the duty of Jane to pay her proportion of taxes on it, as it is that of John. On the other hand, if Jane be violently attacked, it is as much the duty of government to protect her, and punish the criminal, as if she had been the most important man in the nation. She is as much under the defence and care of the government, as any other member of society. So also, if she embark with her goods on board the American ship Alfred, and make a voyage on the high seas, she is by the laws of nations considered a citizen of the United States, protected by its flag, and the government of the United States is bound to put forth its strength in her defence. This right to protection she has, by virtue of her *citizenship*.

An Alien, who is he?

It has been quite a common error, to confound the right of *citizenship*, with the right of *suffrage*. The two are in reality distinct things. One who has the right of suffrage must indeed be a citizen; but one who is a citizen may be very far from having the right of suffrage. All are citizens who are free, and who are born or naturalized members of civil society. But only those have the right of suffrage, or voting, upon whom the compact of civil society has conferred the political power. In fact, not more than one fifth part of the citizens, male and female, hold the right of suffrage.

(28) An Alien is a person born out of the jurisdiction of the United States.[1] The children of citizens of the United States born abroad are, however, excepted from this rule, by an act of Congress passed in 1802.

Aliens have none of the privileges of citizens, except those of suing, and being sued, personal protection, and holding personal property. Aliens cannot possess the right of suffrage, cannot hold real estate, by the law of many of these States, and are not entitled to the protection of the national government, as against other governments.

By the laws of several States of the American Union, the disability of aliens to take, hold, or transmit real property, is removed. This is the case in the States of New Jersey, Pennsylvania, Virginia, Kentucky, Louisiana, Ohio, Indiana, Michigan, Illinois, North-Carolina and Vermont. The original rule either prevails in the other States, or is only partially modified. If a foreign

[1] Kent's Comm. Vol. II. p. 50.

woman, therefore, comes into the State of Ohio, she may hold real property, that is, lands and houses. But in Massachusetts, Georgia, and other States, where this disability is not removed, she could not hold them.

(29) All these disabilities are removed, and the alien becomes, in law, a citizen, by conforming to what is called the Law of Naturalization. The terms by which any alien, being a free white person, can be naturalized, are prescribed by several acts of Congress passed in 1802, 1813, 1816, 1824, and 1828. The general requisitions of the law are these:

1. The alien who wishes to become a citizen must declare his *intention* to become a citizen, *two years* before admission. The *declaration* must be made before a court of record in the States, or before a United States Court, or before the clerk of said courts.[1]

2. The alien must, at the time of his or her admission, satisfy the court, by other proof than his own oath, that he has resided *five years* within the United States, and one year within the State, where the court is held. He must prove that he is a person of good moral character, that he is attached to the principles of the United States American Constitution, and well disposed to the order and happiness of the same. He must, at the same time, renounce any title or order of nobility, if he had any.

3. If the applicant was a *minor*, when arriving in the United States, has arrived at majority when in the United States, has resided here three years next pre-

[1] Act of Congress, May, 1828.

ceding the period of his majority, and has resided here five years in the whole, he may be admitted *without the previous declaration.*

4. Children of persons duly naturalized, being minors at the time, shall, if dwelling in the United States, be deemed citizens.

5. If an alien die after his *declaration*, but before actual *admission*, his *widow and children* shall be deemed *citizens.*

SECTION V.

MUNICIPAL RIGHTS.

Absolute Rights of Persons.

(30) The *absolute rights of persons* are the first class of those rights, in which civil society undertakes to protect its members, by its own municipal sanctions and remedies. These rights are declared and defined in the Constitution of the United States, and in the Constitutions of the separate States. They are rights in which every citizen of the United States, whether man or woman, is equally interested, and in which they will be defended by the whole power, moral and physical, of the government. No principle, or measure of civil institutions can have half the influence upon individual happiness, which is exerted by the proper protection of these great essential rights. In these consist the security of life, liberty, and property; and with them the pursuit and enjoyment of happiness.

Absolute Rights of Persons, what.

The chief of these rights, defended and enumerated in the various provisions of our Constitutions, are:

1. The RIGHT TO LIFE, except when taken away for the commission of crime, by due process of law.

2. The RIGHT TO LIBERTY, to be enjoyed on the same conditions.

3. The RIGHT OF CONSCIENCE, as manifested in the profession of religious faith and the enjoyment of public worship.

4. The RIGHT TO HOLD PROPERTY, and to enjoy its use unmolested; provided it be not used so as to be injurious to others.

5. The RIGHT TO UTTERANCE, which is the right to speak and print what is not injurious to others.

6. The right of citizens PEACEABLY TO ASSEMBLE TOGETHER, and debate public affairs.

7. The RIGHT OF SECURITY of person, property and effects, against inquisitorial and unreasonable searches, and seizures.

8. The RIGHT OF TRIAL, when charged with crime, by an impartial Jury of one's fellow citizens.

9. The RIGHT TO LEGAL REMEDIES for wrongs, committed against us by other persons.

These are the great and leading rights of person, secured to every citizen, by the admirable Constitutions of government adopted in the United States.

Although these absolute rights are affirmed in our national, and State Constitutions, yet they did not originate with them. They are great principles, brought to this country by the first emigrants from England,

and they were embodied in the public acts and charters of all the colonies. In these charters, it was expressly provided, that no person should suffer without positive law, either in life, liberty, limb, good name, or estate; nor, without being first brought to answer, by due course and process of law.[1] It was a provision in the Charter of Virginia, granted by James I., in 1606, and 1609. In that of Massachusetts in 1629; of Maine in 1639; of Connecticut in 1662; of Rhode Island in 1663; of Maryland in 1632; of Carolina in 1663; and of Georgia in 1732, that the colonists and their posterity should enjoy the rights and privileges of Englishmen. The colony of Plymouth formed its first charter and signed it, as a compact of civil government, before the emigrants left their ship. The declaration of these rights was repeatedly made by the colonial legislatures, and in fact the original colonies were pure democracies, in which the people prescribed their own rights, and exercised the powers of self-government.

These rights may be classified more briefly thus: 1. The right to security of person, in all forms. 2. The right to liberty, and its enjoyment. 3. The right of conscience, and its enjoyment by public worship. 4. The right to remedies for wrongs. 5. The right to hold property. Each of these rights is by the Constitutions secured to each citizen of the United States. A woman born in the nation, is as much a citizen, and as much entitled to protection in these rights, as any man in the nation. This is why we must review in

[1] 2 Kent's Comm. 4.

detail these rights, before we proceed to state and discuss those laws and principles of society which relate only to women.

(31) The right to security of person regards, first, LIFE. This is the gift of God, and its enjoyment a right, by nature, inherent in every human being. To take away life *purposely* is murder, the highest crime known to the law. When, however, life is taken in self-defence, the law regards it, *as justifiable homicide*, that is, a pardonable offence.

On the other hand, as a punishment for murder, treason, and in some states, other crimes, *the law* itself takes away life. That the authority of the law may not be abused, or that despotism may not be exercised towards the individual, the Constitutions have several provisions for individual security. Thus, no person in civil life shall be held to answer for a capital, or otherwise infamous crime, (impeachment excepted) without the indictment of a Grand Jury. That is, the Grand Jury for the county, where he or she is, must, on an examination of witnesses, have presented a written paper to the Judges of the court, in which they say (clothed in technical terms) that the charge is in their opinion true. This is called a "True Bill," or presentment of the person charged to the court for regular trial. When this has been done, the person charged is tried, at a time set by the court, before a jury of her or his fellow citizens (*peers* as the common law called them), disinterested as to the parties, and fairly selected by the sheriff from the body of citizens.

Under this head, we may also place that provision of the Constitution, which requires that no person should, for the *same offence*, be twice put in jeopardy of life, or limb.[1] By putting "in jeopardy" is meant the *verdict* of a jury after indictment and trial. If there has been no verdict, it is considered that the person charged has not been put in jeopardy, and may be tried again. If there has been a verdict either of acquittal or conviction, the person tried cannot be tried again for the same offence.

The Law of Voluntary Abortion.

(32) Life *begins*, in contemplation of law, as soon as the infant *breathes* in its mother's womb.[2] This period is to be determined by medical testimony. If a woman in this condition be beaten, or if she administer medicine to herself, purposely, whereby the child is killed, it was not deemed murder by the old English law, but homicide.[2]

(33) Voluntary abortion is made a crime by the laws of most civilized nations. The law proceeds on the principle above stated, that life begins a certain length of time before the infant is born, and its destruction by an unnatural birth, is therefore the destruction of a human life. It is less valuable, it is true, than one which had acquired maturity, and therefore likely to be continued during a natural term. But such an act cannot be viewed, by a civilized people, as less than a high crime.

(34) By *voluntary abortion*, we mean the procuring, either by the mother herself, a physician, or any

[1] U. S. Constitution, Amendment 5. [2] 1 Blackstone, 129.

other person, of an unnatural birth, and consequently the premature destruction of infant life.

By the modern English Statute, 1 Victoria, chapter 85, it is enacted, that any person, who with intent to procure the miscarriage of a woman, shall administer poison, or other noxious thing, or unlawfully use any instrument, or take any other means to that end, shall on conviction thereof be transported beyond seas, or be imprisoned.[1]

The laws of most of the American States contain provisions very similar. By the law of *New York*, the administration of any noxious drug, or destructive substance, or the use of any instrument, unless by the advice of two physicians, is made manslaughter.

By the laws of *Connecticut*, the administration of any noxious drug, or destructive substance, is punished on conviction, with imprisonment in the State prison, at the discretion of the court.

In *Ohio*, the law is almost precisely the same with that of New York. If any physician, or other person, administer any drug, or use any instrument with intent to procure the miscarriage of any woman, unless the same be necessary to save the life of such woman, or be advised by a physician, he or she shall be imprisoned in the penitentiary for a period between one and seven years.

In *Missouri*, the offence is likewise punishable by imprisonment in the penitentiary.

In *Louisiana* the law is the same.

[1] Guy's Medical Jurisprudence, 133.

It is presumed, that the statute law of most, if not all the States, has made some provision for the punishment. The progress of population, wealth and fashion in our country, has made this crime quite common. In the large cities it is, we fear, practised frequently, as it has been in the large cities of the old world. Indeed, public advertisements, shameless as they are, have been published in the newspapers, directing the child of fashion, or of vice, where she might find a woman to perform that service! It is presumed, that many persons, who have practised this crime, have done so in ignorance of the law, and with a belief that it is a comparatively innocent offence. Women should therefore know, and teach others, that the law considers such an act as a high offence, and punishes it, when detected, with severity. They should teach, also, that it is a crime which reflects shame and dishonor on their sex.

Infanticide.

(35) Infanticide is the crime which a mother commits when she destroys a *new-born infant*. In a dense population, even in civilized countries, it is not an uncommon occurrence.

In the eye of the *law*, there is no difference between this crime, purposely committed, and the crime of *murder*. The reason is plain. It is the intentional taking of life, not in self-defence, which constitutes murder. Infanticide constitutes that state of fact. Though, therefore, the life of an intelligent man is more valuable to society, and its destruction more injurious, yet the law cannot make any such distinction.

The miserable woman, therefore, who destroys her new-born child, can neither legally nor morally escape the penalties of murder. The moral indifference and insensibility to affection, which must precede such a crime, is one of those evil and injurious facts of society, which only an increased religious education, both in individuals, and in the tone of the public mind, can correct. It is very rare, that such crimes ever exist in the world, unless there has been some kind of relaxation in the expression of horror and reprobation towards them, by the public voice.

In our country, few cases of infanticide occur, but of late, they have increased.

(36) 2. The *right to security of person*, regards next the safety of *limbs*.

By *limbs* the laws mean those members of the body which are necessary to *self-defence;* for the law concedes the right of self-defence.[1] Limbs are the gift of God to preserve and defend life. The destruction of these limbs by another, is called by the law, *Mayhem.* This is a high crime, and the law regards the limbs of a citizen of so much value, that a person has as much right to self-defence against a loss of limbs, as against a loss of life. A homicide committed in preventing mayhem is as justifiable by the law, as one committed in preventing death.[2]

(37) 3. The security of person also includes a security against *menaces and assaults.* These include any acts, by which the body is directly assaulted, or its

[1] 1 Blackstone, 130. [2] Idem.

comfort and health, by such acts, endangered. Accordingly, the law has made strikings, beatings, woundings or any other species of assault, *crimes*, and made them punishable with severe penalties. So anything, which endangers the health, or prejudices and annoys the body, is an offence by the common law. If it be done, so as to affect many persons, as by a manufactory of unhealthy materials (as a chemical laboratory, evolving poisonous gases), it constitutes the offence called *a Nuisance.*[1]

The Law of Habitation.

(38) 4. The right to security of persons includes a right to be secure in one's *habitation* or domicile. For, if intrusion and trespass was allowed there, it is very evident there could be no peaceful home to any citizen. In a right like this, women are in the highest degree interested; for their home is their world.

There may be two sorts of intrusion or trespass on one's dwelling or habitation. The first is by the government or its officers, under the pretence of legal authority, but in reality, as inquisitorial visits and government seizures. Against this kind of intrusion the Constitution of the United States has expressly provided.

The second illegal intrusion is that of an individual who breaks in upon his neighbor's property, or goes upon it, without authority, and thus becomes an intruder, and a trespasser. This is a private wrong, and

[1] 3 Blackst. 217.

the wrong-doer is amenable to the person wronged in a private action of trespass.

(39) Against the first, or governmental intrusion, the Constitution contains this provision. The fourth amendment to the U. S. Constitution is: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This amendment was made, that there might be no doubt as to the perfect security of the people in their habitations. The dread of insecurity was occasioned by the arbitrary practice of some of the monarchs of England, before the revolution of 1689 had curtailed the power of the throne.

In the time of Charles the First, for example, taxes were levied, by order of the king, and officers sent on to estates and into houses to make assessments. Neither the estates, houses or persons of the inhabitants were secure against intrusion.

The Law of Character.

(40) 5. The right to security of person also includes the right to be secure in *character and reputation.* The crime against reputation is that of *Libel*, when the charge is printed; and of *Slander*, when it is spoken. These are in essence the same thing. Libel and slander really constitute but one moral offence. It is that

denominated, in the ninth commandment, bearing "false witness" against our neighbor. The law makes an important distinction between these two modes of committing the offence. Both are considered by the law, as offences against the person injured; for which he, she, or they may demand and receive, in a suit at law, damages for the injury. But if the charge be *printed*, the law considers the act as more than a private injury. It considers it a crime against the State, for which the offender may be indicted by a grand jury, and tried as a criminal. The reason given for this distinction is, that an offensive charge printed and circulated by the press, has a tendency to disturb the peace of society. For *slander*, therefore, the individual may have his private suit, with such damages, as a jury will give. For *libel*, the party aggrieved may have both a private suit, and a criminal trial of the offender, by preferring his complaint to a grand jury.

(41) *What is slander?* Slander consists, 1. In *uttering words*, which tend to injure a person in point of *personal security, connections, office, interest or profession*, or 2. In *signs or picturesque representations, which tend to injure any one* in these particulars.[1]

Words thus spoken must be both false and malicious, to make them actionable at law.

In the case of slander, our law makes some distinctions, which are sanctioned rather by metaphysics than common sense. Thus, it is said, in the law books, that to charge a person with an *evil intention*, is no

[1] 3 Blackstone's Comm. 123.

slander; because evil *intentions* are not punishable, and therefore, you have not charged the person with an offence. Thus to say of one he is *traitorous*, is not legal slander; but to call him *traitor*, is! This distinction is of some importance to women; for it leaves them without a remedy in what may be considered some of the most provoking kinds of slander. To say of Eliza, that she is a bad-tempered, meddlesome, evil-disposed woman, may be scandal, but is not slander.[1]

(42) *Libel* may be defined, generally, to be *written slander;* and we have already said, it is considered by the law, not merely an offence against the individual, but an injury to the body politic, whose peace it tends to destroy. Hence, it is made a crime, as well as an actionable offence, by the civil law.

The Constitution of the United States has provided that no law shall abridge the freedom of the press; in the 1st amendment to that instrument. This was from high regard to that liberty of utterance, which is essential in republican governments, to the discussion of public affairs, and to civil liberty generally. This provision of the Constitution, however, must be taken with the limitation, that for the *abuse* of the press, the publisher is responsible. Accordingly, when one makes publishing the vehicle for slander, the party injured may bring his action for damages, or may prefer his complaint before a grand jury. A curious distinction arose in the English law, as to what would be admissible in a defence against the charge of libel. In a pri-

[1] 3 Blackst. 125.

vate action for libel, it was decided that the *truth* of the charge made, could *not be given in evidence;* because, said the judges, the public peace is equally disturbed by such a charge, whether it be true or false.[1] When this question came up for decision in the United States, the courts generally sustained the English rule, that the truth could not be given in evidence.[2] But in the Constitutions of Pennsylvania, Delaware, Tennessee, Kentucky, Ohio, Indiana and Illinois, it is provided that the truth *may* be given in evidence, where the libel related to *public official conduct.* In New York and Massachusetts the rule has been extended, so that the truth may now be proved in all cases. But in most of the other States, it is believed that the truth would not be allowed to be proved, in case of a criminal indictment against an individual for charges made, and printed, against private character.

The Law of Personal Liberty.

(43) 6. The next grand class of absolute rights is that which concerns PERSONAL LIBERTY. Next to the right to life, this is the most sacred; for, what can any one do, without the free use of his limbs, the power of locomotion, and the undisturbed control of his faculties? This is a right, also, in which women have an interest quite equal to, if not superior to that of men; for, it is that great function of humanity, whose just exercise leads to the highest elevation of character;

[1] 2 Kent's Comm. p. 20. [2] Idem, 21.

and which has, under all arbitrary governments, been the first encroached upon.

(44) What is personal liberty? Personal liberty is *the right to locomotion without restraint*,[1] which includes the right to the use of limbs and faculties without obstruction. As the operations of the intellect are internal and invisible, they cannot be restrained. If to this natural liberty of the invisible faculties be joined the liberty of locomotion and use of the body unobstructed, it is plain that the individual has a natural and a legal liberty to choose his place, employment, objects, conduct, actions and thoughts. This gives the perfect *freedom of the will*, as related to both mind and body.

Some persons have confounded the opposite of this liberty, which is *slavery*, or the restraint of locomotion and the restraint of the will in regard to place and pursuit, with the *condition of dependence*. This is, in fact, confounding the relations of mind and body, and pronouncing erroneous a condition which originates in the constitution of man, and is, by the laws of nature, made perpetual. By the difference of intellect, and by the providential circumstances in which they are placed, some persons are, and must continue, in a condition inferior to others. This creates the *dependence* of child upon parent, of servant upon master, of employed upon employer, of seller upon buyer, of governed upon government, and, physically, of women upon men. This natural and social *dependence* of relations is not slavery.[2] If it were, but few of mankind

[1] 1 Blackstone's Comm. p. 134. [2] Rutherforth's Instit. p. 239.

could ever be free, and the civil law would be armed with (what it never has been) an invincible argument, drawn from the laws of nature, in defence of legal slavery.

(45) The violation of personal liberty is what is called, in law, *imprisonment*, wherever may be the place, or whatever may be the manner, in which the restraint is effected.[1] This imprisonment cannot be made without due form of law; and when it is made without such process, or where such process is illegally obtained, it is void, and called *false imprisonment.* Thus if Eliza be seized by some one falsely claiming to be a guardian, husband or master, such seizure is false imprisonment, and gives her a right to an action for damages. So, if Jane is arrested on a warrant obtained by fraud, it can be instantly inquired into under a writ of *habeas corpus*, and she will be released. Of that writ, I shall speak under the head of Remedies, p. 147.

(46) A consequence of personal liberty is, that every citizen may abide in his or her own country as long as they please; that is, they cannot be exiled or banished, as was frequently the case in the ancient nations, and is now, under some of the governments of Europe. This right to liberty, as against arbitrary imprisonment, either by an individual or by a government, or against exile, does not, however, exclude or prevent confinement as a punishment, by the just process of courts of justice. But this process, whether a writ, judgment or decree, must be *strictly legal.* If the person be con-

[1] 2 Kent's Comm. p. 26.

fined by a civil proceeding from a competent authority, he will, notwithstanding, be discharged when the jurisdiction of the judge or tribunal has been exceeded, or the party has become entitled to his discharge, or the process was unduly issued, or was not legally authorized.[1]

(47) So absolute is the right to personal liberty, that there is no case in which it is violated, that the law has not provided a way by which the injured person may be released. The only way in which an individual can be deprived of liberty, is by the act of the law itself, in consequence of some offence committed by the person confined.

There are five different classes of persons *not* entitled to their liberty, in an absolute sense; but notwithstanding they are not entitled to liberty, as against those who have legal rights over them, they are all entitled to release *as against third persons* who have no rights over them. These classes are: 1. *Slaves*, in those States where slavery is a legal institution. This *relation* exists only *by law*. It has no foundation in natural or moral distinctions. Its sole foundation is a despotic exercise of power. Notwithstanding this, in the States where it exists, the master has all the rights which the *law* in that State can give him. If, however, even a slave were to be forcibly arrested by those who had no legal rights over him, he could demand his release of the courts of justice. 2. *Soldiers*, enlisted in the army, are not entitled to perfect rights of locomotion; be-

[1] Kent's Comm. 34—36.

cause they have contracted to yield them up to the government on certain conditions. But except in the way they have contracted their liberty away, they are as free as others. 3. *Sailors* are in the same predicament. Both these classes are under military authority; and, except for crimes, without the civil jurisdiction. 4. *Apprentices* are likewise deprived of a portion of their liberty, by a contract made by their parents or guardians with their master. This contract is the same as if it had been made by themselves, they being under the pupilage of their parents or guardians. 5. *Criminals* are, of course, excluded from liberty; the law itself depriving them of liberty, as a punishment for offences.

(48) It follows, then, that the law guaranties liberty to all persons who are not legally deprived of it, 1. By act of the law itself; and, 2. By the contract of the parties or their guardians. We shall see, under the heads of Husband and Wife, and of Parent and Child, that a certain amount of restraint is imposed on women in these relations. In fact, absolute, unqualified, natural liberty is the property of few, though boasted of by many.

Law of Conscience.

(49) 7. Another absolute right of individuals in the United States, is the right to conscience and its enjoyment, in *religious faith, profession and worship.* This is guarded, so far as the legislation of Congress goes, by the 1st Amendment to the Constitution of the United States, which provides that Congress can make

"no law prohibiting the free exercise of religion." By the Constitution of Ohio, and by the Constitutions of nearly all the States of the Union, the utmost freedom and latitude is allowed to every form of religious creed or worship, and even to those who have no belief. Formerly, some religious tests, in relation to public offices, existed in the Constitutions of a few of the States. Those Constitutions have now, with the exception of one or two, been amended, so that the broadest freedom of conscience now prevails.

What is called the rights of conscience would be very difficult of definition in words, but the practice in the United States has given it a very clear exposition. It is the right *to believe, to utter* what is believed, and *to worship according to* that belief. It is regarded here as the most sacred of all rights.

The Law of Remedies.

(50) 8. The right to remedies is a right which is not commonly defined as a distinct right; but it is clearly that right without which there could not, practically, be any other. For the law might *declare* that a citizen had a right to certain things; and yet if the law had not also provided means by which that right could be legally maintained on the one hand, or its violation punished on the other, the declaration would really be void, and of no effect; rights could never be enforced, except by the personal power of the individual. In other words, there would practically be no law but that of natural force.

Accordingly, the common law doctrine is, that *there is no right without a remedy.* In furtherance of this principle, the common law also declares that if the courts of law find no remedy provided, in the precedents before them, they shall *make a new writ,* that is, remedy. At court-law, then, that is, the law of usage, in contradistinction to the law of the legislature, there is really no law without a remedy. The statute or legislative law always aims to provide a remedy; but in fact, from the imperfection of the law, sometimes fails. In general, it may be assumed, however, that there is no legal right without a remedy. It must be recollected also, that in contemplation of law, there are no rights which are not legal.

The *right to remedies* is the only right which may be said to be *universal.* It is the absolute right of every member of society, without exception of sex, color, age or condition, to call upon the law for its protection, when either the government or individuals violate the rights of persons. Even a slave has this right, when crimes are committed against him. Infants and minors have their rights to remedies, which, till they come of age, must be applied for by their parents or guardians. Wives have their rights to remedies; but, in many cases, they must be applied for in the name of their husbands. Single women have the same rights and remedies, precisely, as the male members of society. It is only when they merge their rights, or a portion of them, in the rights of a husband, that single women lose any of the rights which belong to any other members of society.

What are Remedies?

(51) *What are these remedies?* Remedies are framed according to wrongs. There are two classes of wrongs. 1. The first class are those which are called CRIMES. These are what, in civil government, are deemed to be committed against the State, or civil community, rather than against an individual. There is one crime, which can be committed only against the State, viz. treason. 2. The second class are those wrongs which, by the common understanding of society, are deemed to be offences against the individual only, or his interest. Of this kind would be a restraint on the personal liberty of Jane, or a trespass on the home of Eliza. It is true that in some cases the wrong is both public and private. Such is the fact in the case of libel. If Jane be libelled in a newspaper, she has two remedies. She may adopt either, or both. She may go before a grand jury, or she may bring proof before it, that the libel has been printed; and the grand jury will indict the offender for a crime. So also, she may bring her individual suit, and state her damages at what she pleases, relying upon proof of those damages before a jury, as a remedy for the evil she has suffered. As a *general rule*, however, there are but *two* classes of wrongs: 1. Those against the State; and, 2. Those against individuals. For these classes of wrongs, there are also two classes of remedies. The first is that which is pursued by indictment. This indictment is a charge brought by a grand jury against an individual for a crime against the State, and placing him upon trial before a jury of citizens, for the offence with which he is charged.

In this case, the grand jury must have had some information of the crime, and some proof that it was actually committed, before they find what is commonly called a "true bill." The proof before them, however, is only *ex parte;* that is, on the side of those who make the charge, in order that a trial may be had. Hence, after the grand jury have made their presentment or indictment, the person charged is entitled to his or her full and impartial trial, before the court and jury. This trial by jury has been deemed, in our country, one of the most sacred rights of freemen, and one of the most important barriers against arbitrary power; for, it has been thought that an impartial jury, selected from free citizens, will prove an incorruptible defence against tyranny. In accordance with this opinion, the 6th Amendment to the Constitution of the United States provides, that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed; that the accused shall be informed of the cause of accusation; be confronted with the witnesses; have compulsory means of obtaining witnesses; and have the assistance of counsel. These humane provisions are those which govern the criminal law of the United States, and are certainly well adapted to defend the just liberty of the citizen, and to prevent unjust and despotic punishments. They are provisions of justice, to which all classes of society, male and female, are equally entitled.

2. The second class of remedies are those which are

brought, in the name of the individual injured, for an infringement of his personal rights, or the withholding some duty due. This claim is called a SUIT, or in legal language, an ACTION. It is a claim or demand, preferred or presented by the citizen to the courts of justice, in such form as the law prescribes, for some debt, damage or duty due, from one or more individuals, or, in some cases, from the State itself. This remedy is usually tried by the hands of an attorney, who is an officer of the court, and whom the client, whether man or woman, selects as the agent to transact the business in court. He presents the claim of his client in the nature of a petition to the court, that certain debt or damages be rendered to his client. The other party, if he choose, replies; and, on their respective pleas, the trial is had.

(52) This class of remedies likewise belongs to all the members of a civil society, so far as the law deems them capable of being injured. It is true, that the law does not deem all persons capable of being injured in the same way. Thus, minors are incapable in law of performing certain acts, and therefore cannot in all cases, demand in their own name, certain rights or acts from others. They must sue in the name of their guardian, or some legally appointed agent. So also there are many cases in which injuries to the wife can be sued for only by the husband. So also there are many things, in most of the States, which colored persons are not entitled to by law, and therefore cannot sue for. But, just so far as the law deems a person ca-

pable of being injured, it affords them a remedy, and gives them a right to it. That remedy may be, and often is, very far from being adequate to the injury done; but that is rather the fault of the human understanding, and the nature of some offences, than a real defect in the law. The common sense of society, on which the common law rests, aims to give a remedy for all injuries; but often fails to do so, from causes which lie beyond the sphere of any fixed rule of law.

(53) The *Forms of the Remedies*, at law, are almost as various as the forms of injuries. Some of the injuries partaking of the same general nature are classified under one general head. Thus what is called debts, or a common claim for money due, are all sued for in one form of action. But, a debt due on a mortgage is sued for in another form of action. So also a suit brought for a trespass on land, is brought in still another form. These forms for remedies, and their exact application to the several cases of injury, make the most technical part of the law, and that in which the advice of a lawyer is essentially necessary to a woman. When she ascertains that an injury has been done to her personal rights, her children, or her property, she should then apply to a lawyer who has both integrity and ability, that she may be judiciously advised what remedies the law has supplied for such injuries.

SECTION VI.

MUNICIPAL REMEDY FOR PERSONAL RIGHTS.

(54) We shall here consider only those few, and simple remedies, which are necessary to defend and secure, what we have defined and considered as the *absolute rights* of individuals, and which are essential to the enjoyment of life, liberty, conscience, and personal security. In these, women have, if it were possible, even a greater interest than men; for their happiness depends on domestic life, and that on the security of their persons and homes. We shall consider in their order, the *remedies* which a woman, and indeed every human being, as a member of civil society, has for the violation of the absolute rights of persons.

(55) The first absolute *right* we enumerated, was the right to *life*, and the violation of this is the deprivation or destruction of life. What remedy is there for this? To the individual destroyed, or to his friends, there is really none; for, in its very nature, there can be no restoration of life by human power; and therefore, no future enjoyment of *that* particular life, by himself, his friends, or the world. It is this irremediable nature of the wrong, which has caused divine, as well as human law, to place it in the highest rank of crime. In the divine administration upon earth, blood is required for blood. God said to Noah, that "at

the hand of every man's brother will I require the life of man. Whoso sheddeth man's blood, by man shall his blood be shed; For in the image of God made he man."[1] This, though generally taken as the Scripture foundation for capital punishment, would not necessarily furnish such authority, were it not supported by the positive laws of the Hebrews and by other Scripture arguments.[2] It is, however, a prophetic declaration of the fact, which history, with rare exceptions, fully supports as to the general rule, that they who use violence will perish by violence. The Hebrew law, however, expressly provides, that *murder*, or the malicious taking of life, shall be punished with death.[3] It also draws the distinction very nicely between murder and malicious killing, and what is now called *justifiable homicide*, or those cases in which the killing has been done ignorantly, or accidentally[4]. This distinction the common law of England, and the statute laws of the several States of this Union still retain; and the law of homicide is now, in fact, very nearly what it was among the Hebrews.

(56) For homicide, then, there is no remedy for the individual; but for the *State* there may be; for that is continually renewed by new members. The object of the State then is not to remedy the evil of the past, but to *prevent* it in future. The object of capital punishment is, therefore, not merely to punish the criminal, though that is entirely justified, but, by the fear of death,

[1] Genesis 9: 5, 6.
[2] Matthew 26: 52.
[3] Deut. 19: 11—13.
[4] Idem, vs. 4—6.

to deter others from this terrible crime. This punishment is inflicted, as in the case of other crimes, by the presentment of a grand jury, before whom the case has been previously laid by individual witnesses. After indictment, the case is laid before a jury, and if the criminal be convicted, he is, in the case of malicious murder, executed by hanging. The right to *life*, therefore, is guarded not by remedial, but by preventive means.

Punishment of Infanticide.

(57) We have already said (paragraph 35), that this crime (being the taking of the life of a human being), is murder. By the old English law, it would be punished with death. There seems, however, to be a disposition to consider this offence, as murder of an inferior degree. Without directly affirming this, the statute laws of some of the States indirectly assume it, by providing a punishment for *concealing the birth of a bastard*, and for concealing its death so that it may not be known whether it was born alive. The consequence of such statutes seems to be inevitable, that the *infanticide* of a bastard child would be punished under the statute for concealing its death; for it is not an act which would be committed in open day. Some of the statute laws of the States are as follows.

In *New Jersey*, concealing the death of a bastard, imprisonment, a fine.

In *New Hampshire*, concealing the death of a bastard is imprisonment for not more than two years, or the fine of one thousand dollars.

In *Georgia*, the same crime is punished with imprisonment.

In *Illinois*, the same.

In *Michigan*, the law is the same as in New Jersey.

In *Massachusetts*, it is a little different, but substantially the same.

In *Ohio*, there appears to be *no law*, distinguishing infanticide from common murder. Unless there were palliating circumstances, it is presumed that no difference would be made in the punishment. In some of the States not enumerated above, there are probably similar laws.

(58) The next right of persons to which we referred, was the right to safety of *limb*, (art. 36). The destruction of limbs, such as the cutting off of an arm, is made in law a special crime, called *Mayhem*. In Ohio and probably all the States, this crime is punishable by imprisonment in the penitentiary. The suit in this case, as in murder and in all other crimes, is pursued in the name of the State, and by presentment of a grand jury. The party injured is a good witness to prove, either to the grand jury or on the trial, that the crime was committed, by the person charged. Here again, as in murder, there is really no remedy for the party injured; because the law cannot restore a lost limb. The object of the law is to prevent other crimes by the punishment of the offender.

(59) The next attack made on the absolute rights of persons, is by *assaults or menaces*. Assaults on the body may be of various degrees of violence. An as-

sault and battery, as it is called, may be anything from the laying on of a finger, up to a bruising and beating, just short of the loss of life. The law has accordingly made provision for the punishment almost as various. The general punishment, is imprisonment or fine. Some assaults are of so malignant and violent a kind, as to be ranked among high crimes. For example, if Jane in a fit of desperation or malignant purpose, was to stab a person with a knife in the breast, the crime is called *stabbing with intent to kill.* The punishment for this offence, is imprisonment in the penitentiary. For a violent beating another person, the punishment would be, imprisonment in the jail. Again, for a common fighting, the parties are frequently released on payment of a small fine. For *menaces,* the law can provide no remedy but a *preventive one.* Thus, if A *threaten* the life of B, he can be *bound over,* as it is called, *to keep the peace,* on penalty of such a sum.

(60) But the security of person, we have said, (art. 37), may be invaded, not only by assaults and menaces, but *by anything which invades the health or comfort of the person.*

The first class of cases under this head, are those denominated *nuisances.* These may be of various kinds; as for example, putting dead animals in a stream or spring; erecting a lead smelting house, so near the dwellings of others, as to be unwholesome; erecting a chemical laboratory, whose gases are injurious to the neighbors; erecting a furnace so near, that it burns the grass or fences of the neighbors; leaving

an oil factory, a sausage factory, or a soap and candle factory to become unclean ; or in other words, erecting any building, or doing any act, by which "the enjoyment of life and property in others is rendered uncomfortable."[1]

Nuisances are sometimes public crimes, made such by statute, and when they are, they may be indicted, as is described in other cases, by a grand jury. But nuisances are also private wrongs. The remedy is then a suit or action to be brought by the party injured. Thus if some one should erect a smelting house near the fields of Eliza, by which her grass and fields would be destroyed by its noxious air, Eliza has a right to bring a suit before a court authorized by statute to try such questions, in her own name, and to lay her damages at what she thinks proper. This suit will be tried before the court on evidence, and the amount of damages which Eliza should receive, will be determined by a jury. If they think she has suffered wrong, they will fix the amount, at what, in their judgment is just.

(61) There is another remedy in cases of unlawful annoyance, or injury of this kind, which may be called *preventive*. Thus if a chemical laboratory were erected, adjoining the house of Eliza, whose gases are poisonous, and which therefore endanger her health, and even life, she cannot wait for a trial to terminate without being seriously injured. The law provides a remedy in this case, which is more speedy, and is called

[1] 3 Blackstone, 217.

preventive justice. Thus, she may call upon the chancellor, or in those States where there is no chancellor, (as in Ohio), upon the judge of a court, which by statute, has chancery jurisdiction (as it is called), and ask of him an *injunction* upon the offender. The meaning of an injunction is, an *order* of the chancellor or judge, upon the person enjoined *not to do, or commit certain acts,* and if he does, to suffer penalties. These penalties are placed high enough to insure obedience to the order. If on trial, the act in question proves to be illegal, the injunction is continued, and the party thus prevented from further mischief. On the other hand, if the act is lawful, the injunction is *dissolved,* that is, it is taken off by the judge, and the person complained of, may go on as before it was issued.

Thus the person injured by what are called nuisances, that is, acts of others, rendering the enjoyment of life or property uncomfortable or unsafe, may *prevent* its continuance, 1st by injunction, and 2nd by an action for damages, in which compensation will be made by a jury for the injury done.

(62) The absolute rights of persons may also be invaded, by what is termed "unreasonable searches and seizures." This we have said is unconstitutional. That is, the Constitution forbids it to any of the functionaries of government, or to any one professing to act under legal authority; for they are the only persons who can be presumed to commit this offence. An individual who would attempt to search the house or seize the papers of another, in his own right, would be

on the footing of a robber, or one who commits an assault. He would be a trespasser without excuse. It is only under *color of law*, that searches and seizures can be pretended to be made rightly. If, however, the house of Jane be forcibly searched, or her papers seized, what is the *remedy*? An officer of the law, or a public functionary, who enters a house violently, or seizes papers under pretence of authority, is in no way more excusable than any other individual. He is a trespasser, and may be proceeded against as any other trespasser may be. If in committing such an attempt, he were to commit any violence, such as an assault or threat, he might be indicted for that violence by a grand jury, as in the case of assault and battery. If he carried off papers which are of value, he might be indicted by the grand jury for larceny, that is, *theft*. So also in all other cases, for whatever may be done by such a trespasser, Jane, as the party injured, may bring a suit at law, in which the damages may be laid at whatever is thought proper, and the result will be determined by the verdict of a jury.

(63) The next violation of personal rights is that of *slander or libel*. The remedy for this wrong we have already incidentally considered, (42). In *slander* of Jane, by charging her with facts or offences, injurious to reputation, or for which she would be liable to punishment, Jane may have her individual suit, in which she will adduce proof of the slander, and the jury as in other cases, will assess the damages.

But for *libel*, which is printed slander, she may have

two remedies ; first she may go before a grand jury with evidence of the libel, and the grand jury will indict the libeller, as for crime. On the other hand, if she wish to obtain damages, she will bring her own individual action as in case of slander.

(64) The next violation of personal rights is the violation of liberty. This is in fact, a greater wrong than either of those we have considered, except that of taking life. It is next to this in importance, because without liberty, one can do nothing which requires the free exercise of limbs or faculties. This wrong may be committed in various ways. 1. It may be committed under an apparent legal authority ; such as a warrant or writ of court, to confine the body, but which is, in fact, illegal. 2. It may be committed by the violent seizure and confinement of the body, by a person assuming authority, but in reality not having it ; such as a guardian or master under certain circumstances ; or of the husband when the confinement of the wife is violent or unreasonable. 3. It may be committed by the illegal order of the government ; or 4. It may be committed by persons or mobs, who pretend to no authority. In all these cases, the offence committed is that of *false imprisonment*. For this there are two remedies ; one which may be called *instant*, and the other *future*. The instant remedy, or that by which a person illegally confined, may be set at once at liberty, is what is commonly called the *writ of Habeas Corpus*. This is the great means of security to personal liberty. It is what

is called a writ of right ;[1] that is, it is demandable by all persons, in all conditions of rank, color or sex, without exception. This writ is secured by the Constitution of the United States, and by the Constitutions and statutes of the several States, throughout the American Union. It is derived from the English law, and was occasioned by the arbitrary imprisonments, so often made by the English monarchy and privy councils, during the middle ages. The writ of Habeas Corpus had been a matter of right, by common law, from the time of Magna Charta ; but it was disregarded in cases concerning the government, and the liberty of the citizen was often, and most injuriously infringed upon. This was the case even under the enlightened administration of Elizabeth ; and was continued under that of Charles the First.

On account of these oppressions and violations of what was, in fact, one of the greatest safeguards of the people, the famous statute of the 31st of the reign of Charles II. was passed. By this statute, the writ of Habeas Corpus is guarantied to every one of the people ; and each one can demand it, as a matter of right. In this form, it has been adopted in the United States ; and is the greatest legal security the citizen has, against violations of personal liberty.

(65) As any one may be illegally deprived of liberty, the terms upon which this writ is granted, and the manner of proceeding, are of importance. We shall state the conditions of this proceeding, as they are defined in

[1] Kent's Comm. 26.

the statute of Ohio. The mode of proceeding is very nearly the same in all the States. 1. As to the *person*, any one who is not committed for a crime of which they have been already convicted, or is not committed for a capital offence, and who is unlawfully deprived of his or her liberty, may make application for the writ of Habeas Corpus.[1] 2. This application is to be by *petition*, delivered by any one, whether friend or attorney, to any judge of a court of record. 3. A copy of the commitment, or a statement with proofs of the cause of detention, is to be furnished the judge, whose duty it is, *forthwith*, to allow a writ of Habeas Corpus. 4. This writ is an order to the officer, saying, "*you may have the body*," to bring before me; and, on receiving this writ, it is the duty of the officer to convey the person or persons, so imprisoned or detained, before the judge who issued the writ, or some other one of the same court, on the day named in the writ, and also return the cause of detention. 5. On the party appearing before the judge, it is his duty to examine into the cause of detention. If there be no legal cause, the person so detained must be forthwith discharged. But if the detention is by a process of law, and the offence charged be a bailable offence, then the judge is to demand security for his appearance on the day of trial; and if that be given, the party is to be discharged from custody. 6. No person, thus discharged by writ of Habeas Corpus, can be re-imprisoned, unless by a legal order of a court having proper jurisdiction of the matter.

[1] Statutes of Ohio, 1841, page 434.

This is the manner of proceeding, and the consequences of the writ of Habeas Corpus, the great safeguard of liberty, and which is as applicable to every woman and child in the community, as to every man.

(66) The next violation of personal rights is that of *conscience.* It may be asked, what remedy can be found for this wrong? Strictly the remedy, in this case, is included in what we have already defined as the remedy for other personal wrongs; for, in what manner can conscience be violated? Plainly only by restraining the person or trespassing upon the rights of *domicile* (house), in the manner already described. The right to faith, intellectually or spiritually, is not within the reach of human restraint. The restraint, if any, must be upon the right to public worship, or in the imposition of some religious tests. Both of these are unconstitutional.[1] The government, therefore, cannot be presumed to violate this right. How can it be violated by individuals? Only by threats, assaults, disturbances or unlawful entries upon public buildings. All these are remedied in the manner we have already described, under the head of Remedies, for other violations of personal rights.

We have now closed our review of the absolute rights of persons, with the remedies furnished by the law for their violation. These great rights are essential to the life, liberty and happiness of every human being. They are guarantied to every member of civil society, women

[1] United States' Constitution, Art. 1.

as well as men, and to children as much as either, by the Constitution of the United States and those of the several States. We have placed them in the front rank of the law relating to women; because, to no part of society can they be more important. This sketch of these rights and remedies is brief; but it contains the substance of the law on that subject, and all that any citizen needs to know, in order to protect and enjoy his personal happiness.

SECTION VII.

THE RIGHT TO HOLD, AND THE MODE OF TRANSMITTING REAL PROPERTY.

(67) THE RIGHT OF PROPERTY, we have already defined to be *the exclusive right to possess things, in conformity to law* (22). This exclusive right to some property has been recognized by the laws of all civilized nations, since the earth was divided among the descendants of Noah. Indeed, this right of property seems to be recognized also, by all barbarian nations, in their usages, though not always by statute, or prescribed law. It may be assumed, however, as the great fundamental feature of human social organizations. It is assumed, also, as the foundation of moral right, in the eighth commandment, which forbids, expressly, the violation of the rights of property. The civil law, while it agrees precisely with the revealed law in the *principle* of the right to hold property, and the wrong of violating

it, does not rest the *mode* of holding it on moral considerations. The reason of this is obvious. The law of God is applied to the conscience. The law of man cannot reach the conscience. The civil law must judge, therefore, the right to property by an external standard. It prescribes the *terms* and *the mode* by which property shall be held; and if it be not held on those terms, and in that mode, the law assumes that the right itself has ceased to exist. Hence the necessity, in all matters of property, of conforming *exactly to the forms of the law.* The law has no means of ascertaining rights, except by a conformity to the terms and modes, which are prescribed by law.

In accordance with this idea, we shall now consider briefly *the modes by which property may be held and transferred.*

(68) We have stated that property is a right in *things.* Now the law divides things into two classes, viz. things *real*, and things *personal.* The ground of distinction between these classes is very simple, and easily understood. Things *real* are those which are *fixed and immovable*, or those which cannot be carried away with the person. Things *personal* are those which are *movable*, and may be carried away with the person. Thus the best examples of the former are lands and houses; of the latter, money and goods. It is true that there are some things, such as fixtures about a factory, or the iron grates in a house, which admit of some doubt as to which of these classes they belong. But the rule of distinction, again, is of simple application: if the fixture

be one which is necessary to the peculiar building in which it is found, and the business for which it was built, such as the fixed vats of some factories, it is a part of the real property; but if, on the other hand, it may be removed and applied to any other building as well, it is personal property.

(69) This distinction of property, into things real and things personal, must obviously occasion a distinction in the modes of holding and transferring property. For example, a bank note, a purse of gold, or a piece of silk, may be *delivered*, as it is called; that is, transferred from hand to hand, at once, and needs no evidence of that delivery except the possession. What is deliverable from hand to hand must be assumed to be the property of the holder, till evidence is produced to the contrary.[1] On the other hand, things real cannot be delivered or transferred from hand to hand; and hence there must be some mode of proving the transfer, or in other words, some mode of showing *title* to the real property, other than a personal transfer. It is true that a house or farm may be held by possession or occupation, against those who have no better claim. It is probable, too, there may have been a time in the history of society, when occupation, or actual *use*, constituted the sole title to lands. The period when Abraham and Lot fed their cattle on the plains of Jordan, may have been such a time; for Abraham went to one part and

[1] In the criminal law, the possession of the stolen goods is taken as evidence of the theft. But this is not till it is proved that they were the property of another, and have been stolen. Then the possession of the stolen goods is taken as *apparent proof* of guilt.

took possession, and Lot to another; neither seeming to have any other title but possession. But possession is not now the basis or evidence of title, except when the opposing claimant can show no better. Society, as now constituted, assumes that there may be various other foundations for the right in real property, than that of occupation or use. Whether the claimant of this right has any of these various foundations for his claim, must obviously be shown in some other way than mere personal delivery. Hence the modes of title and transfer in and to real and personal property are different. We shall consider, first, the right in, and mode of transferring real estate. We may here premise that a woman's right to property of any kind is entirely changed and modified when she becomes a wife or a widow. We shall consider, here, only those general rights of property which a single woman may have in the same manner as a man.

(70) THINGS REAL, we have defined to be things *fixed and immovable*; or, in other words, things which *cannot be carried about with the person*, in contradistinction to things personal, which can be carried about with the person. This sort of things is, in common language, called real estate. It is, in law language, called "lands, tenements and hereditaments."[1] It would be equally proper and more distinct to say that real estate is *land and the things necessary to and connected with it. Land* means a portion of the soil, or earth, with all things upon it and connected with it; such, for example, as

[1] 2 Blk. Comm. 16.

waters, woods, meadows, and even the structures or buildings erected upon it.[2] For, if Eliza were to convey to Jane twenty acres of land, and there was a house upon it, that house is conveyed with the land. It is true that Eliza, or any seller of land, may make a special contract, that she is to have the right to remove the house within a certain period. But that special agreement does not change the legal meaning of the word *land*. If no such agreement be made, the house is conveyed with the land.

So if Eliza owns twenty acres of land, she owns everything over it or under it; and if she conveys it, she conveys everything. The owner of land, in law language, owns everything above it, to the sky, and below it, to the centre of the earth.[1] Eliza, therefore, owns the mines under her land, and her neighbor has no right to overhang her land with any kind of building or obstruction.

Tenements, one of the law terms in the definition of real estate, signified originally anything that might be *held;* because derived from the Latin verb "to hold;" but it is applied now to the structures upon land, such as houses, stores, barns, etc. The connection of these with land is what we have stated. They are placed upon land and are considered a part of land, and are conveyed when that is conveyed. *Hereditament* properly means what can be *inherited*. But this does not constitute a new species of real estate; it is only an incident to it. All property may be inherited.

[1] 2 Blackstone's Commentary, 18. [2] Idem. 18.

How Estates in Land may be varied.

LAND, therefore, is the general and proper term for real estate. If Jane convey "ten acres of land to Mary and her heirs," she conveys as much, and makes it as inheritable, as if she had used any number of terms.

(71) *Land*, then, is the descriptive term of a very large portion of the property held by mankind; and it is plainly that kind of property without which there could be no other. It is the property in the earth, originally granted by God to man; including its use and enjoyment, with dominion over every creature upon its surface. Hence springs food, raiment, the materials of the arts, and the atmosphere we breathe. In one word, it is property in land, which sustains and perpetuates life. The predominance of the arts, in the highest states of civilization, has occasioned many minds to undervalue the real uses of property in land. But the mother of a family ought to consider the possession of land, in absolute right, as an essential element of the family state; for the simple reason that the possession of a very small piece of land will perfectly secure a family against want or dependence.

We come now to consider the important features of an estate in *land*. A little reflection will show any one that what may be called an estate, or right of property in lands, may be *varied* in three ways. 1. The *quantity* of interest held may be in different proportions; 2. It may be held by one or a number of *persons* together; 3. It may be held and transferred in different modes, or by what are called different *titles;* 4. It may

be held subject to the claim, or, as the law calls it, *lien*, of other persons, and which, therefore, diminishes the amount of interest held by the owner. These are all variations of the estate, and they comprehend all the varieties of right and interest of which an estate in land is susceptible. Let us now follow these varieties through their different forms.

(72) 1. The *quantity of interest* in lands may be varied. By this is not meant the *amount* of lands, for that may be more or less in any measure. This amount of land which may be held, it is proper to say, is not limited in this country, or in any of the modern nations. The consequence is, that immense tracts of land are held, both in Europe and America, by individuals.

By the *quantity of interest* here, we mean the *duration*, or the quantity measured by time. This, it is plain, may vary the estate or ownership, in several different ways. A right to lands, for example, may be varied or measured by life. It may be *for* life, or for a period *more* than life, or for a period *less* than life. There are, in fact, made by law three different kinds of estate, or right in lands, as measured by the duration of time.

(73) An *estate* is such an interest in lands as the tenant hath,[1] whatever that interest may be. Now this estate may be divided, as to the duration of time, in the three ways we have stated above. In the United States, the English feudal tenures are abolished, and with them the limited estates called *fee-tail*, or that

[1] 2 Blk. Comm. 103.

kind of estates in which the owner had not an absolute, unqualified estate; but it was limited over to a particular order of heirs, leaving him no free will as to who they should be. The object of this was to make the estate perpetual in a particular line of heirs. This the people of the United States thought anti-republican, and therefore abolished. The owner therefore cannot, if he please, limit his estate after him to a particular line of heirs, so that they cannot alienate it. This power the statute laws of most of the States forbid him.[1]

Perhaps as good an example of what estate may be given or limited, in the United States generally, may be found in the Ohio statute on the subject of entailment.[2] That statute says, in substance, that no estate shall be given, by deed or will, to any persons but such as are in being, at the time of making the deed or will, and their immediate issue. If, therefore, Eliza should make a will, leaving her house to Jane, then to her eldest son, and after him to his eldest son, and so on, this will would be void, so far as regards the limitations after Jane and her son. It would be construed, by the courts, to give Jane an estate for life, and the absolute and entire estate, after her, to her son. The longest *limitation* that can be made upon an estate, in Ohio, is this: Eliza can will her estate to Jane, and the youngest child she shall have. When Jane dies, and this youngest child has come of legal age, that child has the absolute and entire estate, and may convey it as it pleases. A life in being, and twenty-one years after that life, is,

[1] Vide Statutes of different States. [2] Statutes of Ohio, 1841, p. 319.

then, the longest period to which an estate can be limited in Ohio, and in most, if not all, the States of the American Union.

(74) The three estates into which a right in lands, as we said, may be divided, are, 1. What is called the *fee-simple*; 2. An *estate for life*; 3. An *estate for years*.

(75) A FEE-SIMPLE is the law term to express an absolute, unqualified and unlimited property in lands. It is the whole estate; and all other kinds of estates are carved out of it, and of less duration. When Jane, for example, has a fee-simple, no one else has any interest in the property, or can control her in the use of it.[1] She can deed it, or will it, or leave it to whom she pleases. She can do this, in whole or in part, as to quantity or duration. If she desire, however, to convey this estate absolutely, in fee-simple, to another, by deed or will,—it is important for her to know the legal words which will make such conveyance absolute. These are "to Eliza Robinson and *her heirs*." The word *heirs* is absolutely necessary to make a conveyance in fee-simple, for this reason: if the conveyance were to Eliza Robinson only, she would take only a life-estate, and the reversion, or the residue of the fee-simple would revert to Jane, or her heirs, the original grantor. A fee-simple, then, is the entire estate; and

[1] We must be understood here to speak of single women. Of marriage and its consequences, we shall speak hereafter.

[2] Blk. Comm. 140.

it must be conveyed, by a grant, to some person and his or her "heirs."

(76) An ESTATE FOR LIFE is what these terms express, an estate which continues for the life of the holder only. The holder can grant no use of it, or power over it, beyond the life for which it is held. As a fee-simple is absolute, and not limited to the life of one or any number of persons; it follows, that after the life-estate is taken out, there is, in the fee-simple, a residue left, which must belong to somebody. This residue is the fee-simple itself, after this particular life in which the estate now vests, is terminated.

(77) This residue is called a REVERSION, and may vest in two ways. 1. If the grantor, Eliza, made no further grant than the life-estate in Jane, then the fee-simple, that is the reversion, comes back to Eliza, if alive, and if not, to her heirs; for she never parted it. 2. Eliza may grant the reversion directly, by conveying the life estate to A, with a reversion of the fee-simple to B. The fee-simple must be in somebody; and, if not conveyed away directly, is in the original owner.

(78) This last kind of reversion, or expectancy, is called, in law, a REMAINDER; and is distinguished from the Reversion, so called, only because it is the residue of the estate (not remaining in the party himself), but *granted* by that party after creating a less estate. Thus if Eliza grant an estate to Mary for her life,—remainder over to B and his heirs,—the fee-simple, thus granted to B, is called a *Remainder;* but if Eliza grant an

estate to Mary for life, and say nothing about the residue, it reverts to herself or her heirs, and is called a *Reversion.* The only real difference is, that the *residue,* in the case of a *reversion,* comes back to the original owner or his heirs, and the same residue, in the case of a remainder, goes to some one to whom he has granted it. A reversion, as it is said, is by the act of the law; but a remainder, by the act of the party making the grant.

(79) A LIFE ESTATE is a right to an estate in lands held during a *life,* whether that life be more or less in duration. It may be held, too, for the life of any person, whether it be the life of the party holding the estate, or the life of any other person. Thus Eliza may grant Mary an estate during the life of Mary herself, or she may grant her an estate during the life of Jane. In the first instance, the estate will terminate on the death of Mary. In the second, should Jane live longer than Mary, the heirs of Mary will be still entitled to the enjoyment of the estate. In one word, the estate will belong to Mary and her heirs as long as the life lasts for which it is granted, be it more or less than her own. In the United States, the principal life-estates are those of surviving wife in the real estate of her husband, called *dower,* and that of a surviving husband in the real estate of his wife, called an estate by *courtesy.* Both these estates we shall consider in detail, under the head of *Husband and Wife.*

Life estates may be created, as we have said, by a special grant or agreement; but in the United States

far the larger number of life estates are those by dower, courtesy, or those created by will, either as substitutes for dower, or as a provision for friends in some particular cases.

(80) An ESTATE FOR YEARS is an estate for a fixed period of time, which period is fixed by the contract or grant between the parties.[1] It is, in fact, what is commonly known in the United States as a *lease* or a rent for a certain length of time. As, for example; Eliza, a widow, leaves her farm, for *twenty years*, to John Johnson. He has, in the farm, what is called an Estate for Years. So Jane owns a house in Blandford, and rents it to James Paler for five years. This is called an estate for years. It is, in fact, such rights in land as the owner confers, by contract, on the occupant, for a fixed length of time. This estate is always deemed less in interest than an estate for life; because, life is indefinite, and there is always a possibility that a life may outlast any moderate number of years. Besides this, there is a dignity in human life, which places it above a fixed period of years.

There is an estate for years, in the United States, which, in fact, gives an absolute property in the *use* of lands, but which is called a *lease*. This is a *perpetual lease*. The form in which it is executed is, a grant to A. B. for *nine hundred and ninety-nine years, renewable for ever*. This is in order to keep up the form of a lease for a fixed number of years, while in fact it gives A. B., the tenant, the property in the land as long as he

[1] 2 Black. Comm. 140.

chooses to pay the rent, or whatever may be the conditions imposed by the lease.

This property being, in fact, of the same permanency as a fee-simple, only that it is subject to a given rent, the State of Ohio, by statute passed in March, 1839, placed it on the same level. That statute directs that permanent leasehold estates shall be subject to the same law of descent and distribution, and to the same mode of sale or execution, as fee-simple estates.

(82) There is another kind of estate for years, called an *estate at will.* This is where lands are let to another, at the will of the person who lets the land. It is held at the will of either party; and it is explained by the very terms in which it is expressed. So also, an estate, as it is called, *by sufferance.* This is where one has come into possession lawfully; as where A. B. had a lease and it is expired, he holding the property beyond the expiration of the lease. These tenants have, in fact, no real property in the land. They only hold while the owner pleases. In these cases, as the tenant is in actual possession, he has it in his power to remain till the owner turns him out. This delinquency of tenants is, in some of the States, as in Ohio, a cause of great inconvenience to landlords. The law provides a mode in which, after some delays, the tenant may be turned out of possession. But in Ohio, and in some other States, it does not provide any mode by which the rents, in the intermediate time, may be secured. Where widows and other single women own houses or lands, the laws of the State, in this respect, should be care-

fully examined. The better way is, to take a moderate rent, and take it in advance, for a specified time. There can be, then, but little loss from tenants who hold over without payment.

(83) An estate in lands is also varied by the *number of persons* who hold it. Thus one person may hold the estate, whether in fee, for life, or for years; or, several persons may hold it together.

By the old English law, there were several modes in which several persons might hold, together, a property in land. In the United States, however, the English law has, in this respect, been very much modified; and estates of this description have, in some of the States, been reduced to one, viz. what is called a *tenancy in common*.[1] It is well, however, to know what are the two chief modes in which a plurality of persons may hold title in the same piece of land. By the English law, the *first* mode is called *joint tenancy*. This is where A. B., for example, grants, i. e. deeds, a piece of land to Eliza and Jane, and their heirs. Here it is held that because this title comes to Eliza and Jane at the *same time*, by the *same conveyance*, and grants the *same quantity of interest*, therefore Eliza and Jane have a property in what is called *the entirety*. That is, Eliza and Jane each own property in every particle of the whole land, and not in half which may be divided. The consequence of this doctrine is, that if one of two joint tenants die, the survivor takes the whole property. The heirs of the one who died, take nothing. This is called

[1] Vide Revised Statutes of Ohio.

the *right of survivorship* in joint tenants; but this right of survivorship has been deemed, in a majority of the American States, contrary to the great republican principle which pervades American law, that *estates shall not be accumulated by the act of the law itself.* This we have here illustrated by the case of the abolition of estates in tail, or estates limited to a particular line of descent (73). This right of survivorship has been expressly abolished in the States of Connecticut, Pennsylvania, Virginia, Kentucky, Indiana, Missouri, Tennessee, North and South Carolina, Georgia and Alabama.[1] In Ohio it is declared not to exist, by the decision of the supreme court.[2] In does not exist in Louisiana. In Maine, New Hampshire, Massachusetts, Rhode Island, Vermont, New York, New Jersey and Delaware, it is abolished except where the party granting the estate expressly declares it shall be a joint tenantry. In two or three other States, joint tenancy remains as it does under the English law.

In Ohio, and we presume in all those States where joint tenancy is abolished, land may be held jointly by what is called an *estate in common.* This is the common way for several parties to hold land together; and it is necessary for owners of real estate to know what this means.

An ESTATE IN COMMON is where more than one person holds some estate in one piece of land. It need not be derived from the same person, nor held by the

[1] 4 Kent's Comm. 35.

[2] 2 Ohio Reports, 306.

same title, nor in the same proportion. There may be many tenants in common, holding by different titles, in different proportions. Thus A. B. may grant, out of one hundred acres of land, an undivided fourth part to H. T. After this, A. B. may die and leave heirs, John and Jane. John, Jane and H. T., are then tenants in common, H. T. owning an undivided fourth part, and John and Jane each one half of three fourths. But John, Jane and H. T. may desire to have their estate separate; or, Jane alone may desire to own her part individually, and possess it alone. By the English statute concerning tenants in common, by the Ohio statute, and we presume by the law of all the States, Jane has a right to demand a partition of the estate, by which her part will be set off to her. The mode of doing this is usually by petition to some court, as directed by statute. The court will order the sheriff, or some other officer, to make partition, which he does by summoning a certain number of freeholders, who, under oath, divide the land, in the proportions of the tenants in common. But if it be some property, such as a house, which cannot be divided without injury, then the freeholders appraise it, and the sheriff makes his return, with the appraisement, to the court. Then any one or more of the parties may elect to take the house or other property, at the appraised value; but if they do not so choose, then the property is to be sold at public auction, and the proceeds of the sale are to be divided among the tenants, in proportion to their interests.

This is the statute mode of proceeding in Ohio; but the mode is the same in principle, if not in detail, wherever partition of estates in common is made.[1]

SECTION VIII.

THE MODES OF TRANSFERRING REAL ESTATE.

(84) The modes of *transferring* real estate comprehend all the modes by which one acquires and another loses real property. These modes are called, in law, TITLE. There may be imperfect titles, but it is not of these we shall speak. For example, A may have the *possession* of property; and, as against others who have no better right, he may be entitled to hold it. So B may have the right of *property* in a piece of land of which another has the right of possession. But neither of these persons have a perfect title. The complete title is only held by one who has both the right of property and the right of possession.[2] It is only of complete legal titles that we shall speak; because incomplete titles involve litigation, which a woman should not go into without the advice of a lawyer.

(85) TITLE is said, in the law, to be of two general kinds. The first is *descent* or inheritance. This is where the title vests in A. B. by what is called the *operation of law*, and is the case of a man who, on the death of his ancestor, acquires his estate as his repre-

[1] Statutes of Ohio, 1841, p. 616.

[2] 2 Blackst. 199.

sentative or heir at law. In this case, the title does not arise, in any way, by his own act.[1]

(86) The second general mode of acquiring title is where the title is vested in the party by his own act, or agreement. This is called title by *purchase.* In common language the word 'purchase' only means the buying of something by bargain and sale. But in law it means many other modes of acquisition. In fact, it means all modes of acquiring title which depends, directly or indirectly, on the parties' own act. In this country, the modes of acquiring title by purchase may be reduced to the modes of *alienation.* The word 'alienation' comprehends every mode of creating title by which estates are voluntarily resigned by one and accepted by another. These modes of alienation may, in substance, be reduced to three. 1. Alienation by deed. 2. Alienation by record, or judicial proceedings. 3. Alienation by will; or, as it is called, desire. We shall now consider the transfer and acquisition, or the title to property, under these four heads. 1. Descent or inheritance. 2. Conveyance by deed. 3. Conveyance by record or judicial proceedings. 4. Conveyance by will. These are, perhaps, not the only technical modes of transfer; but they are, in substance, the only modes in which real property is conveyed in the United States.

(87) 1. Of title by descent. Inheritance is no doubt the earliest regular mode of tranferring land, and

[1] 2 Blackst. 201.

the most natural; for nothing could be more natural or just, than if the parents acquire property by their industry, possessing and cultivating the earth, that their children should succeed to their right of property in it. In the modern civilized nations, this principle is established, that the children are the heirs of their parents. By *heir* is meant one who succeeds to the estate of his ancestor.[1] The right of property the heir takes is called the inheritance. The *heir* succeeds to the *title*, which is cast upon him by law, at the instant his ancestor dies. But though the heir inherits, at once, the title, it does not follow that he or she will necessarily possess the property; for there are certain claims which by law have priority to even the rights of the heir. 1. If the ancestor be the father, and he have a wife living, she is entitled to *dower* in his lands. 2. If the ancestor be a mother, and she leaves a husband living, he is entitled to a life estate in the lands of his wife, called the estate *by courtesy*. 3. If there be a mortgage on the lands, it must be paid before the heir will have an unincumbered title. 4. If the ancestor leave debts due from him, and there is not personal property to pay them, the creditors have a right to have the lands sold as means to pay their debts. All these claims are by law made *liens* or incumbrances on the land, when fee-simple title descends to the heir at law. Of these incumbrances, however, we shall speak under other heads. Here we are confined to the order of inheritance, or the question, to whom and in what man-

[1] 2 Blk. 201.

ner does land descend? This is undoubtedly the most important principle connected with the laws of property in any nation, if indeed, it be not the most important connected with the institution of government. For if the law of descent be such, that property must descend in one channel only, and if by fee-tail (limited right of property in each generation,) or any other restriction, it cannot be diverted from that channel, it follows as certainly as any conclusion of reason, that except in a few extraordinary cases, the lands must be kept in a few families, and must accumulate in the hands of a few individuals. Such has been the fact in England since the Norman conquest, except that the laws restricting alienation have been gradually overcome, either by fictitious devices or actual abolition, so that real property may now be alienated with comparative ease. The laws of *descent*, however, remain substantially the same; and as a consequence, the English government is, and has been, in fact, an aristocracy. The chief principles of the English law of descent are these:

(88) 1. The first idea connected with the doctrine of descents is that of *consanguinity*.[1] This is the same with the general principle of kindred. They are kindred, in some degree, who have descended from a common ancestor; and therefore their blood is consanguineous. *Lineal* consanguinity is that which subsists between those who *descend or ascend from one another in a direct line;* as for example, the relation which

[1] 2 Blk. Comm. 202.

What Consanguinity is.

exists between the father, son, grand-son, great-grand-son, etc. *Collateral*[1] consanguinity is that which subsists between those who descend from a common ancestor; but *not* in a direct line; as for example, the relation between two cousins, A and B, who descend from a common grand-father John Stokes, but from two different mothers Caroline and Eliza, who were the daughters of John Stokes. A, the grand-son, Caroline his mother, and John Stokes the father, are united in *lineal* consanguinity; for they ascend and descend in a direct line; but A the son of Caroline, and B, the son of Eliza, are united in *collateral* consanguinity; for they are the descendants of John Stokes, but not in a direct line.

(89) The steps in this consanguinity are called *degrees*, and are counted by the number of removes which the most remote of the two is from the common ancestor.[2] Thus Caroline and Eliza are related in the first degree, because they are both one remove only from the ancestor John Stokes. But Eliza, and A the son of Caroline, are related in the second degree; because A the most remote of the two is in the second degree.

(90) We shall now state the rules of English inheritances, that we may see how widely we have departed from them in the United States, and especially how much more favorable the American law is to women. The English canons, as they are called, are these:

1. The first is, that inheritances shall *lineally descend* to the issue of the person, who last died, seized

[1] 2 Blk. Comm. 205. [1] Idem, 206.

of (that is, holding) the estate; but shall never lineally ascend. That is, the parent shall not inherit from the child. The estate shall descend but not ascend.

2. The second rule is, that *males* shall have priority before females in the order of inheritance.[1] If John Stokes, then, have a son William, he shall inherit the whole estate, to the exclusion of Caroline and Eliza.

3. The third rule is, when there are two or more *males in equal degree, the eldest shall be preferred;* but the daughters when they inherit shall inherit equally together.[2] Thus if John Stokes had two sons, William and James, as well as the daughters Caroline and Eliza, then William, the eldest, shall take the whole estate. But if William and James should die before their father, the two daughters, Caroline and Eliza, shall inherit equally together. This principle of English law is called the right of primogeniture. That is, the right by which the first-born male takes the whole estate. It had its origin in the feudal principle, that the eldest son must take his father's place in war, and therefore should have the estate to maintain his strength and dignity.

4. The fourth rule is, that the lineal descendants, to infinity, shall take *by representation*, that is, they shall represent and stand in the shoes of their ancestor.[3] For example, the child, male or female, of William the eldest son of John Stokes, shall take the estate in preference to James the younger son of John Stokes. But suppose that William and James, the sons, die be-

[1] 2 Blk. Comm. 212. [2] Idem, 214. [3] Idem, 216.

fore John Stokes, and that then Caroline the eldest daughter, also dies, leaving three daughters of her own; then, their grand-daughters shall take just their mother's part; that is, one half the whole; the other half going to Eliza, their aunt.

This taking by representation is called, technically, taking by *stirpes*, which means taking by the root. However many descendants or heirs there may be, they must take together just what their ancestor, who was the heir apparent, when alive would have taken. There is another mode in which they might have taken, which is, by the head; that is, take as many parts as their numbers entitle them to. Thus in the example last given, the three nieces of Eliza take by representation but one half the property (that is, what their mother was entitled to), but by the head (per capita) they would have taken three-fourths, and their aunt Eliza but one. This will illustrate what is meant in law, by taking *per stirpes* (the root), or *per capita* (by number).

(91) 5. The fifth rule of the English law of descents is, that on failure of lineal descendants of the person last holding the estate, it shall descend to his *collateral* relations of the blood of him who first acquired the estate, (not by descent) but by actual purchase or acquisition.[1] This means, that if John Stokes had no children, but his brother died leaving children, they shall inherit. But if there were no such collateral heirs to be

[1] 2 Blk. Comm. 220.

found, by the feudal law, the estate *escheated* to the monarch.

(92) 6. The sixth rule is, that this collateral heir must be the next collateral kinsman of the *whole blood*.[1] This means that the kinsman of the whole blood shall be preferred to the kinsman of the half blood, although the kinsman of the half blood may be nearer in degree. A sister of the whole blood is heir in preference to a brother of the half blood, where the brother had actual possession.

(93) 7. The seventh rule is, that in collateral inheritances, the male stocks shall be preferred to the female.[2] The relations on the father's side are to inherit to infinity, before those on the mother's side can take at all. The principle of this rule is the same with that of the 2nd and the 5th. In fact, all these rules depend upon two ideas of the feudal law. The first was, that a right to lands depended upon military service, by which they are to be defended; and that this military service is to be rendered, of course, by males, and that where there are several of these in equal degree, the eldest takes the shoes of his father, and steps into the estate.

The second idea is, that by virtue of this military tenure, all estates were originally derived from the monarch; and that when the direct heir fails, the heirship is to go among collateral males, descending from the original tenant of the crown, and when they failed, the estate escheated to the crown itself. It may be

[1] 2 Blk. Comm. 224. [2] Idem, 234.

said, that in the case of a daughter inheriting, this military principle failed. Not so. The old feudal law provided for that case. It gave the feudal baron or the monarch, the right of controlling the marriage of this female tenant, (as she was called), on the principle that her husband must be a person capable of doing military service to his superior lord or to the crown. This was, however, too cruel a barbarism to last in an age of refinement and intelligence ; hence it has been abolished ; but the rules of inheritance laid down above, still remain principles of British law.

(94) Let us now turn to the American law of inheritance, and we shall observe the traces of a complete revolution in the laws regulating the descent of property. This revolution has been eminently favorable to women, and to liberty ; but is not so entirely complete as not to leave some reproaches on American law, in its unequal treatment of women.

The first remark we have to make on the American law of descent is, that all municipal laws are created in the United States, in one of two ways. 1. State law enacted by the State legislatures ; or 2. Common law, which is made by usage and sanctioned by the legislatures in the silence of the statute law. The law of inheritance, however, being one which exercises no small degree of influence on the political organization, is one which has been acted on and regulated by the State legislatures, we believe, in all the States. It is not a national law, and consequently not uniform. The descent of property is, therefore, regulated by different

rules in different States; and it is quite possible, that the father or mother of a family should own lands in different States, and their children inherit them in different proportions according to the laws of those States. The laws of the different States agree in this, that they have done away with the feudal law and its restrictions on the partition of property.

(95) 1. The *first rule of American inheritances* is, that if a person owning real estate dies holding it, or as owner (without a device or will), the estate shall descend to the lawful descendants from the intestate, in the line of lineal descent; if there be but one, to that one; if several in equal degree, to all as tenants in common, without regard to sex, or priority of birth.[1] This single rule destroys the great principles of primogeniture, and preference of males to females, which distinguishes the feudal law.[2] For example, if John Stokes has two sons, James and William, and four daughters, Caroline, Eliza, Jane and Mary, all six inherit, under the American rule, equal portions as tenants in common. Mary, the youngest daughter, inherits as much as either. By the English rule, James, the eldest son, would have inherited the whole of the real estate. In one case, the estate would descend entire from generation to generation, while in the other it would be divided into six parts in the second gene-

[1] 4 Kent's Comm. 375.

[2] The Jewish law adopted the rule of primogeniture to a certain extent. The eldest son received a double portion. See Introduction.

ration, and probably into many others, in a subsequent period. So also if John Stokes had one son, who died leaving five grand-children, those grand-children also inherit equally, because they are in an equal degree. So also, if John Stokes had a son A, who died leaving two children, John and Mary; and he had another son B, who also died leaving five children, John and Mary would have no special advantage. They would take equally with the five descendants of B, who like themselves are grand-children, standing in equal relation to their grandfather. That is, they take *by the head* and not by *the root.* In R. Island, N. Jersey, N. Carolina and S. Carolina, and Louisiana, they would take *by the root*;[1] that is, the grand-children would each get the parent's share. The two children of A, would get one half the estate, and the five children of B, the same.

(96) Another principle or idea, should be remembered in connection with this rule. By the English rule, the ancestor from whom the property was inherited must have *held actually* the property, in order to remit it. That is, he must either be in possession, or receive rents, or have had it delivered to him by going on the ground, or it could not be transmitted. This was a feudal rule, and in the United States is done away with. If a man in the United States has any right of property in lands, no matter whether it be in possession, in remainder, reversion, or any other free-

[1] 4 Kent's Comm. 375.

hold interest, it is the subject of heirship, and on his death intestate is transmitted to some heir.[1]

(97) 2. The *second rule of American descents* is, that if the owner of lands dies leaving lineal descendants in different degrees of consanguinity, such as living children, and grand-children of others who are dead, they shall inherit as tenants in common; but they shall take *by the root;* that is, those in the most remote degree (or grand-children) shall take only the part which would have come to their immediate ancestor. For example, John Stokes has James, William, Caroline, Eliza and Jane—children. James married and died leaving two children, Mary and Robert. William still lives. Caroline married, and had a son Charles who also grew up, married, and died leaving three small children, who are the grand-children of John Stokes. Their grand-mother Caroline then dies, and finally John Stokes himself. In this case there are children, grand-children and great-grand-children, all to inherit. The rule is, that the estate shall be divided into as many parts as there were children; that is, five. The three living children, William, Eliza and Jane shall each have one part. The two grand-children, Mary and Robert shall have the part of their father James; that is, one tenth of the estate each. The three small great-children shall have the part of their grand-mother Caroline; that is, one fifteenth of the estate each. Had they been in an equal degree of consanguinity, they would all have taken equally; but, where the

[1] 4 Kent's Comm. 386—388.

heirs of lineal descent are in unequal degrees, those farthest off take *by the root;* that is, the part only of their immediate ancestor.

(98) 3. The *third rule* (which prevails in some States and is modified in others) is, that if the owner of the land die, without lawful descendants, leaving parents, the inheritance shall ascend to them, either first to the father, and next to the mother, or to both jointly.[1] This is directly contrary to the English rule, which affirms that an estate cannot ascend, (par. 90). Nor does this American rule prevail in the majority of the States without much modification. The estate goes to the father, (unless it came from the mother, and then it goes to her, or her kindred), in the States of Maine, N. Hampshire, Vermont, R. Island, N. York, Kentucky, Virginia. The rule is modified, in respect to the claims of the wife and the brothers and sisters of the whole blood, in the States of Massachusetts, Georgia, Maryland, N. Jersey and Louisiana. In Louisiana the father and mother take together a half each. In Missouri, the father takes equally with the brothers and sisters. In Connecticut, Ohio, North Carolina, Tennessee, Mississippi and Alabama, the estate goes to brothers and sisters; and then to the father. In Ohio, in default of lineal descendants the estate goes first to brothers and sisters of the *whole* blood; next, to brothers and sisters of the *half* blood; then to the father, and if he be dead, to the mother.[2]

(99) In the preceding cases, the estate goes to the

[1] 4 Kent's Comm. 393. [2] Statutes of 1841, p. 287.

father, with the exceptions stated. But there are instances in which it goes to the *mother*. For example, in N. York, Pennsylvania, and perhaps some other States, if the estate come from the mother, it ascends to her in default of lineal descendants, even if the father be alive. If the father be dead, then the mother takes, in several of the States. In Illinois and Louisiana, she takes, in default of issue, the inheritance equally with the father. In Massachusetts, R. Island, Connecticut, Ohio, Delaware, Maryland, Alabama and Mississippi, in default of issue, of brothers and sisters and father, the mother takes the inheritance.

(100) The *fourth rule* is, that if the intestate[1] die without lineal descendants, the estate goes to the brothers and sisters and their representatives.[2] We have already seen (par. 98) that in six States, the estate in default of lineal descendants, goes to the brothers and sisters in the first instance. This rule refers to those in which it does not. But, in either case, when the estate descends to brothers and sisters, the rule of descent among them is the same in principle as the first rule of descent (par. 95). Thus, if the representatives of the brothers and sisters are in *equal degree*, (however remote), they *take equally*, that is, *by the head*. But if they are in unequal degree, those most remote take only *by the root*, that is, they take the share only of their immediate ancestor. Thus if the intestate die

[1] The term *intestate* signifies simply, one who died *without a will;* for if he made a will, the estate goes as he directs.

[2] 4 Kent's Comm. 400.

leaving a sister, Caroline, and two nephews, children of his brother John, Caroline will take one half the estate, and the two nephews one half between them, that is, one fourth apiece. This principle applies in all cases, where the heirs are in unequal degrees. Those farthest off, take *by the root*, that is, the share of those they represent.

Uncles and aunts are postponed to nephews and nieces, in all but three or four States. In New York, Pennsylvania, Ohio, and in twenty-one States, the nephews and nieces have precedence over uncles and aunts, although they are of equal degree.[1]

(101) The *fifth rule* of American descents is, that in default of lineal descendants, of father and mother, and of brothers and sisters, or their representatives, the estate shall go to *next of kin* to, and of the blood of, the intestate.

(102) Who is *next of kin?* It is *not* either the lineal descendants in any degree, nor the parents, nor brothers and sisters, all of whom are provided for under the preceding rules; but, in default of these, who is it? In the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Pennsylvania, Delaware, Maryland, Ohio, Illinois, South Carolina, Georgia, Alabama, Mississippi and Louisiana, the *grand-parents* take next to the parents or brothers and sisters. But in New York, New Jersey, and North Carolina, the grand-parents are excluded altogether. In the remaining States, the rule is mixed.

[1] 4 Kent's Comm. 402.

After the grand-parents, the *next of kin* are counted by degrees from the intestate.

(103) If there be no *next of kin*, the estate goes, by the laws of Ohio, Rhode Island, New Jersey, Virginia and Kentucky, to the *wife* of the intestate, or the husband, if it be a woman. It has happened in Ohio, and may frequently happen, that the wife, in this manner, may be the heir of her husband.

(104) A *sixth rule of inheritance* is, that posthumous children inherit, in all cases, in the same manner as if they were born in the life time of the intestate. This is the rule, both in English and American law. For all the purposes of heirship, a child unborn, but *in ventre sa mere*, is considered as born.[1]

(105) A *seventh rule of inheritance* is, that a bastard can neither take by descent, nor transmit, except to his own children. The principle of the English law is, that a bastard has no inheritable blood.

(106) But though this is the general rule, it has an exception. The *mother* of a bastard dying intestate, may inherit from him, in the States of Vermont, Rhode Island, New York, Virginia, Kentucky, Ohio, Indiana and Missouri. In some other States, this is also the case, with modifications. In Maine, New Hamphshire, Massachusetts, New Jersey, Pennsylvania, Delaware, South Carolina, Georgia, Alabama and Mississippi, bastards are placed under the English disabilities.[2] They can neither inherit nor transmit.

(107) By the statute of Ohio, illegitimate children

[1] 4 Kent's Comm. 412. [2] 4 Kent's Comm. 413—14.

are made legitimate by the *subsequent intermarriage of the parents and the acknowledgment of the children.* In several other States, this is also the case.

(108) A *seventh rule* is, that in counting the *degrees* of consanguinity, the first is the intestate himself; and from him they ascend to a common ancestor, and then descend from that ancestor to the heir, reckoning a degree for each person in each line. For example, the father of the intestate stands in the first degree, the grand-father second, and the uncle in the third, and the cousins in the fourth. Thus Peter Stokes, the father of John the intestate, is one degree; William Stokes, the grand-father of John, is two degrees; Thomas, the son of William the grand-father, is three; and Caroline, daughter of Thomas, is four.

(109) An *eighth rule* of descents is, that the law casts the estate at once upon the heir, without any act of his own. The moment the intestate is dead, the estate, by title, is in the heir; for it can be in no one else. The *title* is, in law, always in *somebody;* and as it has passed from the intestate, it can be nowhere but in the heir. The estate may actually be in possession of some third party, and the heir may be obliged to bring a suit for his rights; but the title is, at once, vested in him by the death of his ancestor. That death acts upon the heir, as a deed of conveyance of all the rights in the estate, which the intestate had.

(110) 2. Of title by purchase. We have already said that in law (par. 86) the word *purchase* means every mode of acquiring title, which is by the person's

own act, and not by operation of law. This mode of transferring lands is also called alienation. The right to alienate, that is, to transfer property to others, is an incident to the right of property; for, without it, there could be no absolute property. It has been seen, however, how very far the feudal law went in preventing this right of unlimited alienation. The principle of this was, that the *heir* must be one capable of doing *military service*, and therefore the males were preferred to the females, and the eldest to the younger; but the younger might be minors, incapable of rendering that service. It has also been seen how completely the laws of the United States have, in these important particulars, subverted the feudal law. Here males and females, older and younger children, share alike. There is no restraint allowed, either in the line of descent, by fixing it in one species of heir. The principle of our law, therefore, favors the transfer and the subdivision of real estate. The consequence is, that the alienation of lands is a very common transaction. Lands are, in fact, an article of merchandize in the United States. They are continually transferred and continually subdivided. In these transactions, from the greater equity and freedom of our law, women have an equal interest with men. The modes and necessary incidents of the alienation of lands should therefore be known to every woman who either owns or expects to own real estate.

(111) There are three principal modes of alienating lands. They are, 1. By deed of conveyance. 2. By execution; that is, where a party, having incurred debts,

has lands sold by the law to satisfy them. The one who purchases them takes his title by *execution*. 3. By will; that is, devise. These are the three common and important modes of alienating lands in the United States. A very few plain rules will teach a woman all that will be of any practical use, in the conveyance of land.

1. Of deeds. The title by deed is the most common of all, because deeds are the best known and the most usual form of conveying real estate. A deed is a writing sealed and delivered, by the parties to it.[1] The deed itself is complete when it is written, signed and sealed *in the mode required by the statute law*. But the deed does not take effect until, in the language of the law, it is *delivered;* that is, there must be something done, by which the party to whom the deed is made, may know the fact, in order that he may be a party to the contract. This delivery may be done in several ways: 1. The deed may be given to the party or person; or, 2. It may be given to his authorized agent; or, 3. It may be given to a third person to deliver to the party, on condition; as, for example, the payment of the purchase money, etc.; or, 4. When both parties are present (as is commonly the case) and the usual formalities of execution are complied with, and the contract is apparently consummated, it is a valid deed, notwithstanding it be left in the keeping of the person who makes it.[2]

(112) Far the most important subject connected with deeds, however, is the various circumstances at-

[1] 2 Blackst. Comm. 295.

[1] 4 Kent, Comm. 455—6.

tending their execution. The law considers the execution of a deed as a very formal and solemn transaction; because it is the act of parting with lands, which is, in the eye of the law, the highest species of property. That this serious act may not be performed hastily or inadvertently, the laws of every State in the Union and most civilized countries, have required certain formalities and solemnities to be performed, without which the deed is not valid. It is a very common idea among those who are not lawyers, to esteem these formalities very lightly, and think them rather an abridgment of natural rights, and frequently an obstacle to equity. If I do give my property to John Stokes, why is not that enough? Why go through these useless forms? This is a most hasty and erroneous view of the subject. *If* you *do* give your lands, just so in quantity and bounds, there is no need of anything more. But it is precisely *to ascertain that fact* that these formalities are required. If you hand a thousand dollars, in money, to John Stokes, it is a transaction which explains and proves itself. Money *can* be handed from hand to hand; and he who has it in possession is presumed to have a right to it. But lands cannot be handed over. The right must be ascertained in some other mode. The bounds must be defined exactly; the amount given for it must be stated; and it must be given to certain persons, precisely ascertained in the deed; because, it is only by this accurate statement of the transaction, that the rights of future parties to this specific land can be ascertained. A deed, then, is a precise instrument,

which must be executed according to the forms of the statute law.

(113) Notwithstanding this, however, a deed is a much simpler instrument, and much more easily understood and executed, than most persons suppose. All that is really necessary to a deed is explained in the following particulars.

(114) 1. Of terms. In making a deed, the following law terms should be understood:

1. The *grantor* is the one who does grant, or makes the deed.

2. The *grantee* is the one to whom the deed is made, and to whom the land is granted.

3. The *consideration* is what is paid, given or exchanged for the lands by the party to whom they are granted.

4. The *seal* originally meant a mere impression of the peculiar mark, sign or arms of the party making the deed. As in the United States, however, persons generally have no *arms* or *signets*, which was an appendage of the feudal system,[1] the statute laws of most of the States require only a *scratch*[2] or mark, as substitute in place of the seal.

5. The *acknowledgment* is the acknowledgment of the party that he did make the deed, made before some magistrate of the law, and written out by him.

(115) To make a valid deed of conveyance, binding

[1] The seal or signet was used from the earliest ages: Gen. 33: 18.

[2] In the Eastern States the seal on wax seems to be required yet; but in the Western States the scrawl is generally adopted.

upon both parties, the following requisites are necessary: 1. The parties to the deed must be persons *able to contract*. There are several sorts of persons, that have no legal ability to contract, and therefore cannot make a deed. Thus idiots and lunatics cannot contract, because they have no capacity of mind; and therefore if they convey away lands, the conveyance is void. Next, persons under *duress* (that is, threats of the loss of life or limb) cannot make a valid deed, because not free in mind. Again, minors may convey, but the conveyance is conditional; for if they deny the deed when they come of age, it will be void. In other words, when they come of age, they can make their deed either valid or invalid. If Caroline, at sixteen years of age, make a deed of land to John Stokes, when she comes of legal age, she can affirm or deny the deed. So also, it is not every person who can take by deed; thus, by the common law of England, and by that of some of the States of the American Union, aliens cannot hold land. If they cannot hold land, then the deed to them is void. So also, a deed *to* idiots or lunatics is void; because they cannot assent to the deed. There must, then, in a deed, be named a party capable of granting land, and a party capable of receiving it.

(116) 2. There must be a thing contracted for,[1] and this thing must be accurately described in the deed, so that it can be found and ascertained. Thus the grant of "ten acres of land in Warren county," where the grantor owned more than that quantity, would be void for its uncertainty; for, *where* can this particular

[1] 2 Blackst. 296.

piece be found? So a grant of "five acres of land in my half section," is void for the same reason: it cannot be found. Persons making deeds, then, should *describe* the land conveyed, so accurately, that it can be found and separated from every other piece of land.

(117) 3. A deed must *express in it a consideration*[1] for the grant. This may be either a valuable consideration, as money or property; or, it may be to kindred, in consideration of blood, and love. Either will be sufficient. The mentioning of the consideration is, however, a formal matter, and it may be any sum, however small.[2]

(118) 4. The next requisite is, that a deed must be written or printed; but in the last case, the signatures or names must be written.[3] The form of the writing is not material, provided it clearly sets forth to the parties to it, the consideration, the description of the land conveyed, and the other formalities we shall mention. This will be legal, if it be done in the simplest and briefest manner possible.

(119) 5. The deed must be signed, sealed and acknowledged before a magistrate, as described in (art. 114).[4]

(120) 6. In nearly all, if not all, the States of the American Union, a deed must have *witnesses;* that is, persons who subscribe their names in attestation that the grantor in the deed executed it, in manner and form

[1] 2 Blackst. 296.

[2] A deed cannot be made on an unlawful or immoral consideration. All such considerations are, by law, void.

[3] 2 Blackst. 297.

[4] 4 Kent's Comm. 452.

as set forth. In New Hampshire, Vermont, Connecticut, Georgia, Ohio, Indiana and Illinois, two witnesses are required to the execution of a deed; and the deed is not valid without them. But in New York, Maryland, Kentucky, Alabama, no particular number of witnesses is necessary. One will do, and that one may be the acknowledging magistrate. The object is to *prove* the execution of the deed; and, in these States, one witness is sufficient to do that.[1]

(121) In all the States of the Union, deeds are required to be *recorded*.[2] In Ohio, they must be recorded within six months. The object of this recording is to *give notice* to all other persons that this land has been so conveyed. As to the conveyance from the grantor to the grantee, that is good whether the deed be recorded or not. But suppose John Stokes deeds land to Caroline Niles. She forgets to record this deed, and A, who is in a hazardous business, becomes embarrassed. His creditors get judgments at law against him, and these judgments become incumbrances on his land. They thus obtain the very land which he had sold to Caroline, because Caroline had forgot to record her deed. If she records her deed in time, she acquires priority over all subsequent claimants. But if she omits to record her deed in time, she loses her priority of claim.[3]

(122) To the validity of a deed, then, there are requisites: viz. 1. It must be a transfer from a party who is legally *able to grant*, to one who is legally *able to receive*. 2. It must *describe accurately*, so that it can be precisely ascertained, the thing or land granted.

[1] 4 Kent's Comm. 457. [2] Idem. 256. [3] Idem.

3. The grant must be made on the *consideration* either of the pecuniary value received by the grantor, or from natural affection between the grantor and the grantee. 4. It must be *written, signed, sealed, acknowledged* and *delivered* by the grantor. 5. The deed must be *attested* in some way, in order that it may be *proved.* In most of the States, this must be done by witnesses. 6. The deed must be *recorded*, in order to give it *priority* over those who may hold, in some way, subsequent claims.

(123) When a deed comes to be written, all these requisites may be put in a very short space. No formal words are necessary, except those which express clearly an *actual grant* or transfer of the thing described, and those which are necessary to *define the estate*, whether for life, for years, or in fee-simple, which the grantor intends to convey.

(124) 2. Of TRANSFER BY EXECUTION. In modern times, and especially in the United States, the sale of property under a sheriff's execution, or an order of court, has become a very common mode of transferring real property ; and many of the titles to land depend on the legality of these sales. All persons, and especially *women,* should look accurately into the proceedings of judicial officers, in the case of a transfer by execution. For, the law will not hold such a title legal, when it fails in any one of the judicial processes required by statute to perfect the execution. The reason of this is, that the transfer *is not a voluntary* but a forcible one, on the part of the party whose land is seized and sold by

law. The *law*, therefore, grants him the full benefit of the errors which the court or its officers may make in this legal operation.

(125) Under the English law, as the alienation or transfer of land was contrary to the spirit of the feudal system, lands could not be sold for debt so far as the *absolute title* was in question; but, as commerce increased, the demands of trade for the security of debts, compelled the parliament to grant a certain species of execution against lands. The substance of this was, that the creditor might take the *use and profits* of the land, till the debt was paid. This was not transferring *the title* to the creditor, by any means. The creditor was esteemed only a trustee in possession for the benefit of the debtor,[1] by the payment of the debt.

(126) In the United States (in most of the States), lands are considered as proper a subject of transfer and subdivision, by execution, as goods and money. They may be subdivided and sold, at the will of individuals; and they may be seized and sold, for the payment of debts, in the same manner as personal property. This is *the fact* in all the States, though the manner of doing it varies.

(127) Lands are held subject to the payment of debts, in whosoever's hands they may be. They are liable for debts, in the debtor's own hands, either under a judgment, decree or order of court. They are considered *assets* (that is, *funds to pay*) in the hands of executors and administrators, who may obtain an order of the court of probate, to sell them for the purpose of paying

[1] 4 Kent's Comm. 429.

debts, educating children, or removing any species of incumbrance; or, lastly, when they descend to heirs, they may still be made liable to the creditor, by a proper process of law.

(128) The only advantage real estate has over personal property, in regard to liability for debts is, that, as a general rule, the creditor must *first* resort to personal property for the payment of his debt.[1] That is, a writ of execution must first be levied, by the officer to whom it is directed, on personal property, goods, chattels or money. If there be none, then the writ is levied on lands.

(129) The *first requisite* to the validity of a title by execution is, that there should be a judgment, decree or *order of court*, legally ascertaining the exact debt and recording it, as *evidence* of the creditor's claim. Without this judgment, there can be no such thing as an execution.[2] An execution cannot issue merely on the *claim* of the creditor. That claim must first be legally ascertained and placed on record.

(130) In the case of a judgment thus duly recorded in court, the *second step* is the *issue of an execution*, as it is called. The execution is an *order*, issued by the court, at the request of the creditor or his attorney, to the sheriff, commanding him to make the amount of the judgment rendered against the debtor, first out of his goods, and in default thereof, of his lands and tenements.

[1] 4 Kent's Comm. 430.

[2] In the case of an order of sale to executors and administrators, the order itself is the execution.

(131) The *third step*, in most of the States, is the *appraisement* of the lands for the purpose of transfer. This transfer, however, is made, in different States, *in two different ways.* In a portion of the United States, lands taken in execution are *appraised*, that they may be *set off* to the creditor at the appraised value. In other States, the appraisement is made *for the purpose of sale;* in order that the lands may not be sold below a certain proportion of the value. The rule in this respect is various. 1. In Maine, New Hampshire, Vermont and Massachusetts, after the sheriff levies an execution, he has it appraised, and then delivers possession to the creditor, by described boundaries, and the creditor takes the property at the appraised value. When this is done, the sheriff *returns* the transaction to the court, where it is recorded, and the *record* conveys the title to the creditor. A certain time is given the debtor to *redeem his land in.*[1] 2. In Rhode Island and Connecticut, the transaction is the same, but the debtor has *no time* to redeem in. 3. In Ohio, the lands are to be appraised and *sold at not less than two thirds of their appraised value.* 4. In New York, Kentucky and Tennessee, lands are to be sold under execution, but the debtor may redeem them, in one year, at ten per cent. interest. In other States, still different rules prevail.

(132) In those States, such as Ohio, where lands are sold by the sheriff, the title is conveyed in a deed, made by the sheriff in his official capacity. This deed must

[1] 4 Kent's Comm. 433.

recite the legal transaction, and must be executed with the same formalities as other deeds.

(133) In the transfer of title by execution, the great principle to be observed is, that *every part* of the transaction, as conducted by the legal officers, must be in exact accordance with the provisions of the statute law. For, as regards the debtor, whose lands are sold, it is a forcible transaction; and therefore he is entitled to all the benefits of any legal defect in the proceedings. For example, if the judgment or order of court, under which land is sold, be not legal, all the proceedings under it will be void. If the sheriff has not made the appraisement required by law, the sale will be invalid; and so, if the deed have not all the legal requisites, the conveyance will not be good. It becomes purchasers, therefore, to examine with care the title which is made by execution; a species of title which, in consequence of the facilities for transferring land in this country, has become very common.

4. Of title by will. The transfer of land by will is also a very common mode of conveyance. A will is defined to be *a disposition of real and personal property, to take effect after the death of the testator.*[1] When the will acts on real estate, it is called a *devise*. In common language, this instrument is called the "last will and testament."

The power of distributing and directing property after the death of the owner, is not a natural idea; and accordingly many of the ancient nations did not permit

[1] 4 Kent's Comm. 500.

it. In the early periods of Athens and of Rome, wills were not allowed; and among the ancient Germans they were forbidden. In some of these States, as in the early history of Athens, wills were prohibited from motives of policy; for, it was supposed that the power of willing real estate would be exercised in favor of accumulation in estates; and therefore property could not be as much subdivided as if it were distributed equally among the children. So also among the Hebrews, property could not be devised away from the regular succession. The law of jubilee alone would, among the Hebrews, prevent any permanent distribution of property by will. So also, under the feudal system, lands held by military tenure, could not be devised; because, the effect of the devise would be to change the tenure, and affect the rights of the feudal lord. This restraint, however, was long since removed. In the time of Henry VIII, and afterwards in that of Charles II, statutes were passed by which lands may be absolutely transferred by will. In the United States, we have adopted very nearly the English statutes on this subject; and in all the States of the Union, lands may be transferred by will.

(134) A will, like a deed, requires several conditions, without which it is not a valid conveyance. These conditions, however, are simple and easily understood by all persons. To women it is an important matter, that requisites to a valid will should be properly understood; for, either in the capacity of devising property to others, or of receiving it, by devise, from others, women are

very frequently the main parties to wills. In many instances, wills are made solely for the benefit of wives or daughters; because the law has not shown, in all instances, equal favor in the distribution of property with men. Thus it is not very uncommon, for a man to die leaving a wife, without children. In this case, she would have nothing by law, in real estate, but her dower; while the fee-simple went to collateral heirs. The husband would desire to counteract this, and he does it by will. So also he may leave a wife and one child; in which case, the child would receive a disproportionate share, in comparison with the mother. Here again, the evil may be remedied by will.

The requisites to a will are these:

(135) 1. There must be parties able to contract.[1] Persons of sound mind and legal age may devise lands by will. But idiots, lunatics and minors cannot devise lands. So also, as a general rule, *married women* cannot make a devise of real estate. If, however, lands be settled on trustees for her benefit, she may appoint, as it is called, to *whose use* they shall go.

This general rule, excluding married women from the power of making wills, is one of the most curious pieces of barbarism extant. For, by the general law, the fee-simple of a woman's real estate descends, when she is married, as it does when she is single, to her natural heirs; and if this is admitted, why should she not have the power of making a will as much after marriage as before?

In some of the States, there is a more reasonable

[1] 4 Kent's Comm. 505.

rule; and a married woman may make a will and devise lands, in the same manner as men. These States are Ohio, Illinois, Connecticut, Mississippi and Louisiana. In Ohio the rule is as liberal as possible. The first section of the statute of wills in Ohio declares, that "any person of full age and sound mind and memory," may make a will. This excludes neither sex nor color. In men, the legal age is twenty-one; and in women, eighteen.

(136) But though some descriptions of persons cannot make a will, yet most of these persons may take property under the will. Minors, married women and slaves may take real estate, under a will, as devisees. But in those States where an alien cannot hold lands, it is presumed the devise of real estate would be inoperative. Thus the New York statutes say, that a devise to an alien, at the time of the devisor's death, is void.[1]

(137) 2. *Of the things devisable.* The rule of the English law was, that only such lands could be transferred by will as the devisor had title to (that is, was seized) in possession, at the time of making the will, and remained so till the time of his death. The meaning of which is, that lands *bought after the will was made* are not transferred by it, but went to the heir. The theory was, that a will was, like a deed, a conveyance of property; and therefore could not convey more than what the person had when the will was made. In the United States, a large number of the States have determined differently, viz. that whatever property is

[1] 4 Kent's Comm. 506.

descendible to an heir, will pass, by will, to the devisee. In New York, Connecticut, Massachusetts, Pennsylvania, Virginia, Kentucky and Ohio, every estate and interest descendible to heirs may be devised; and any words, expressing the testator's intent to devise all his real property, will transfer, by will, all that he had devisable at the time of his death.[1] In Ohio, property of all descriptions is made devisable.

(138) 3. *Of the execution of a will.* In England, and in the United States, the general rule is, that a will shall be in writing, signed by the maker of it, and attested by witnesses. The number of witnesses varies in different States. In the States of Maine, Vermont, N. Hampshire, Massachusetts, R. Island, Connecticut, N. Jersey, Maryland, S. Carolina, Georgia, Alabama and Mississippi, *three witnesses* to a will are required. In N. York, Delaware, Virginia, Ohio, Indiana, Illinois, Missouri, Tennessee, N. Carolina and Kentucky, *two witnesses* are required. The testator, or some one by his express directions must subscribe the will in the presence of the witness. In Pennsylvania the will is good whether *subscribed* by the witnesses or not, provided its authenticity can be proved.[2]

(139) It is necessary that the witnesses should subscribe in the presence of the testator; but it is not necessary that they should subscribe in the presence of each other; nor that they should attest at the same time with the testator; nor at the same time with one

[1] 4 Kent's Comm. 512. [2] Idem, 514.

another; nor that they should subscribe altogether, or know the contents of the will.[1]

(140) It is not necessary except in the single State of Vermont, that the will should have a seal. In this respect, it differs entirely from a deed.

(141) A last will and testament of personal property, must in general, have the same solemnities, as one conveying real estate. In Ohio, the second section of the statute of wills, makes no distinction in the mode of execution, between a will for real, and one for personal estate.[2] So also, in Pennsylvania, Virginia, Tennessee, and it is presumed, several other States.

(142) There is one exception to the rule requiring a will to be in writing. This is the case of what is called a *nuncupative will.* That is, a will made in the last sickness, near death, in which it is presumed the testator had no power of writing his wishes. The provision of the statute of Ohio, which it is presumed is like that of other States, is this; A verbal will made in the last sickness, shall be valid, *in respect to personal estate,* if reduced to writing and subscribed by two competent disinterested witnesses, within ten days after the speaking of the testamentary words. They must likewise prove, that the testator was of sound mind and memory, was not under restraint, and called on some one present to bear testimony to the disposition of his property then made.[3] This kind of will, it must be recollected bears relation only to personal property.

[1] 4 Kent's Comm. 516.

[2] Statutes of Ohio, 1841, Wills.

[3] Idem, Sect. 68.

(143) Witnesses to a will are made incompetent to take any interest under it, except in the case of creditors who may be witnesses, and yet receive their debts under the will.

(144) *Of the revocation of a will.* A will is, of course, changeable during the lifetime of the testator, for the best of reasons; because it depends on his mind and intentions alone, and he may change them when he pleases. But the law, in kindness to heirs, has presumed a revocation of a will, when certain great changes have taken place in the family of the testator. Thus it is a settled rule of the English law, that *marriage, and the birth of a child* subsequent to the execution of the will, are a revocation in law of a will of real as well as personal estate, *provided* there was no provision for the wife and child, and the entire estate was distributed to their exclusion.[1] In substance, the same rule prevails in the United States. Thus, in the States of Maine, Vermont, N. Hampshire, Massachusetts, Connecticut, N. York, N. Jersey, Pennsylvania, Delaware, Ohio and Alabama, a *posthumous child* will inherit in the same manner, as if the father had made no will, unless some provision is made for it, or it is particularly noticed. In all of these States, except Delaware and Alabama, children born after the making of the will, and in the lifetime of the father, will inherit in like manner.[2]

(145) It is an old rule of the English law, that the will of a *single woman* is revoked by her marriage.

[1] 4 Kent's Comm. 521. [2] Idem, 526.

But by the statute of Ohio, it is expressly provided, that the will of an unmarried woman shall *not* be revoked by her subsequent marriage.[1]

(146) A second will revokes the first, provided it has a clause of revocation in it, or makes a different and incompatible disposition of the estate; otherwise it does not.[2]

(147) An alteration of the estate or interest of the testator in the lands devised, revokes the will, on the ground that it implies an alteration of the testator's mind.[3] This rule, however, is not true, in the case of mortgages or incumbrances on the land, which are regarded only in the light of securities; and the rule does not hold either, when there is a mere bond for sale or any other agreement touching the land, provided the title to it still remains in the testator.

(148) In the statute of Ohio, it is provided that where the maker of the will has a child absent and reported to be dead, or shall have a child afterwards not provided for in the will, this absent child and this subsequent child shall take the same share of the estate, that they would have been entitled to, had the testator died without making a will.[4]

(149) A will may, of course, be revoked by the direct act of the testator; such, for example, as tearing, cancelling, obliterating or otherwise destroying the will, provided the same be purposely done by the testator or under his direction. Or it may be revoked by direct words for that object, in a subsequent will or codicil.

[1] Ohio statute of wills, § 39.
[2] 4 Kent's Comm. 528.
[3] Idem, 528.
[4] Statute of Ohio, § 43.

What a Codicil is.

(150) *A Codicil* is an addition or supplement to a will.[1] It must be executed with the same solemnity, as the original will. It is not a revocation of the will, except in the precise degree in which it is inconsistent with it; or unless there are positive words of revocation.

(151) 5. *Of the construction of wills.* The construing of wills has employed much time in the courts, and brought forth much learned ingenuity. The whole of it lies in a very narrow space. 1. The will must dispose of the property according to the rules of law. For example, Caroline will not be allowed to *entail* an estate according to the English custom; because such entailment is expressly forbidden by the American statutes, and one cannot do dead, what they could not do when alive. 2. The great principle of construction is, to discover and carry out the *intention of the testator.* If we can discover what that is, and it is not contrary to law, the court is bound to carry out that intention. 3. The great difficulty in wills is to discover what kind of an estate or interest in lands, the testator meant to convey; for many persons draw wills who are not lawyers, and do not know the legal, technical words necessary to carry out the idea of the maker of the will. In some States, much of this difficulty is got over, by a simple statutory provision. In N. York, N. Jersey, Ohio, Virginia, Kentucky and Alabama, it is declared by statute, that every grant by will of any interest in lands, shall be construed to convey all the estate, or in-

[1] 4 Kent's Comm. 537.

terest therein, which the grantor or testator could convey, unless it clearly appear by the will, that it was intended to convey a less estate.[1]

(152) When the testator is dead, the will must be *proved*, before it can take effect. This is called, in law, the probate; and for this purpose, there are in all the States, either a distinct probate court, or it is made the duty of some existing court to attend to this business. In conclusion, we may say, that in the drawing and probate of wills, a woman should always consult a lawyer of skill and honesty; for it is easy to commit an error, and those who do not receive as much by will, as they would have done by law, are always anxious to overturn a will; and there are many devices, by which, in the absence of strict technical observance, the will of the testator is overturned.

SECTION IX.

THE MODE OF TRANSFERRING PERSONAL PROPERTY.

(153) *Personal property* we have defined to be those things which are *movable* (68) in contradistinction to real estate, which is fixed and immovable. The law has divided personal property into chattels real and chattels personal. The former is, however, rather attached to lands, than to personal property. A *lane* for example, is called a chattel; but a lane most clearly springs out of, and belongs to land. We shall confine

[1] Ohio statute of wills, § 49.

ourselves strictly to personal property, which in its nature and in the law belonging to it, is, and must be governed by different principles from lands, or permanent property in the soil.

(154) In the first place, there are many different sorts of personal property; but all of them are distinguished by one characteristic, that of being capable of following the person, and not necessarily attached to the soil. For example, the following classes of personal property are the most common, and the most in every-day use. 1. Money. 2. Jewelry and dress. 3. Furniture. 4. Animals in domestic use, such as horses, cows, sheep and hogs. 5. Tools and machinery. 6. Books, maps, etc. 7. Merchandize, that is, goods of every description. 8. The crops actually gathered for use. 9. Promissory notes and bills. These things may all, it is plain, be transferred with the person. They are movable, and therefore called personal property. They are also articles which concern the immediate comfort and existence of a family more than any property in land, and therefore women are, as a general thing, more deeply interested in them. Vast numbers of women, such as widows, and those without parents, have no property except the little furniture, dress and domestic animals, with which they manage to keep their household together. There are also a large number of men, laborers and mechanics, who have no other property. The law relating to such property, is not complicated, and we shall state the chief principles, which govern its use and transfer.

Evidence of Title to Personal Property.

(155) 1. In the first place, the title to personal property does not, necessarily, require proof, as that to land does, through any formal instruments. For example, the most common evidence of title to personal property is *possession*. If Caroline has in her use and possession, a mahogany table, she cannot be asked to show a title-deed or any other formal evidence that the table is hers. It is proof enough, while uncontradicted, that she is in the use and possession of it. If it be not hers, there are only two ways in which she could have come by it. 1. By actual theft; and 2. By loaning, hiring or finding it lawfully, but now unlawfully detaining it. In the former case, she will be tried as a criminal, and in the latter case, the right of property may be tried in a suit, provided by the law for that purpose. But in no case, is the holder of, or claimant to personal property, obliged to show title, by any formal instrument of writing. It is enough to be in possession to make an apparent title, and any proof, verbal or written, will be admitted to show a better title in another claimant.

(156) 2. *Money*, one of the peculiar forms of personal property, has also a peculiar law of title. Money, whether in the shape of coin or paper notes, is in its very nature, made transferable by possession. It is *current from hand to hand.* The title to money, therefore, is its *possession*, and nothing else, except only the cases in which it is either stolen or forged. This, however, concerns the criminal law, rather than the title to property. It is taken from the criminal,

then, not so much from want of title, as by virtue of punishment for a criminal offence. In its very nature, current money must belong to the holder. It would destroy its character, as money, if questions of title could be raised in its transmission from hand to hand.

3. *Promissory notes*, bills of exchange and certificates of bank stock, or other corporate stock in personal property, likewise have a peculiar law of their own. Notes, due-bills and bills of exchange are instruments declaring that so much money is due, and agreeing to pay it. A promissory note makes this agreement for the person who draws and signs it. But a bill of exchange makes an order on a third person to pay it, with an implied agreement, that if he does not pay it, the maker will pay, as in a promissory note. These notes and bills may be made payable, either at once, (in present time), or at any length of time the parties may agree upon. The most material variation in these notes is that which prescribes the mode of transfer. This may be of two kinds. 1. The note or bill may be drawn payable to *bearer*. Or 2. It may be drawn payable to *order*. In the first instance, the note is, like money, transferable from hand to hand, without any other act of conveyance. Whoever is the *bearer* is entitled to receive the money. No proof of title is necessary to the holder. In the second case, before the note can be legally transferred, the person to whose *order* the note or bill is written, must write her or his name across the back of the note. This again may be done in two ways. Suppose the note is drawn paya-

ble to the *order* of Eliza Jones. Now Eliza Jones may write on the back of that note, "Pay to the order of Eliza Simpson.—Eliza Jones." Now this is precisely like the first drawing of the note. It is to the *order* of Eliza Simpson, and she must write her name on it to constitute a legal transfer of that note. But Eliza Jones may write her name in another way. She may write on the back of the note, her name "in blank," as it is called. That is, she may write simply "Eliza Jones." The effect of this is to make that note henceforward payable to *bearer* like the first kind of notes. For this plain reason, that whoever holds the note, may write above the name of "Eliza Jones," the words "pay the bearer," and as Eliza Jones, to whose order the note was originally made, has signed that direction, the note is henceforward the same as if it were payable to *bearer*.

(157) Eliza Jones, to whose order the note was drawn and who has thus transferred it by her signature, is called an *endorser;* that is, one who has *written on its back*. The legal effect of her signing it is, that she *guarantees* that Peter Thompson, who wrote and signed this note promising to pay so much money to her, shall pay it to the holder whoever it may be. If Peter Thompson, then, fails to keep his promise to pay this note, Eliza Jones must pay it, in his place. She has made herself responsible by her *endorsement*.

(158) Now it must be observed that, in the ordinary course of business, Eliza Jones is under no necessity of endorsing that note at all. It is a voluntary act, which

she does for her own convenience. If Peter Thompson has made his note, promising to pay her one hundred dollars at the end of six months, and she can afford to wait for the money (which, in prudence, she ought to do), she may keep the note till the time expires and Thompson pays her. It is only when she wants to raise money out of that note, by selling it, that she must endorse it. This sale of the note to some one who advances money upon it, is called a *discount*. It is called so because the purchaser takes off the interest, or something more, as his consideration for advancing the money. This kind of transaction is the chief business of banks and other money dealers, who buy notes and bills, making their profits out of the discount. They have, for security, the promise of the maker and the endorsement of the one to whom the note is made. This is the mode in which *endorsements* are usually procured. They are simply *security*. When the endorser receives the money, he in fact does no more than cash his own note, and is accountable for no more than his own note; but when the endorser does not receive the money, but the maker of the note receives it, the endorser is said to endorse for the *accommodation* of the other party. In other words, the endorser becomes the security of the principal. This has been, in all forms, a dangerous transaction; and one against which that treatise on wisdom, the Proverbs, especially cautions its readers.[1]

(159) BILLS OF EXCHANGE vary from promissory notes in this; that the maker of the bill, instead of

[1] Prov. 6: 1—5.

promising to pay the money himself to the holder, *draws an order on a third person*, in favor of the holder. Thus Peter Thompson, instead of making his note to the order of Eliza Jones, draws an order on John Stokes for one hundred dollars, to the order of Eliza Jones. Now the first thing that is to be observed in this transaction is, that John Stokes cannot be bound to pay this order without he consents to pay it; for, any one may draw an order on another, whether that other owes the money or not. John Stokes is only bound, then, to pay that order when he *accepts* it, which he must do by writing his acceptance, or what is the same thing, his name, "in blank," across the face of the bill. The first thing, then, for Eliza Jones to do, when she gets a bill of exchange like this, is to *present* the bill, either herself, or by an agent, to John Stokes for acceptance. If John Stokes *accepts* the bill, he is then called the *acceptor*, and is legally and morally bound to pay the sum mentioned in the bill, in the time and at the place mentioned in the bill. Against him Eliza Jones has her first claim. But, in this case, she has additional security; for, if John Stokes will not or cannot pay the bill, Peter Thompson, the drawer of the bill, stands in the attitude of an endorser or security. For, by drawing the bill, Peter Thompson implies in the transaction that John Stokes will pay it, and if he does not, that he will pay it himself. But suppose John Stokes does not accept the bill? Then there are two parties to it, Thompson the maker and Eliza Jones the holder. In this case, Thompson stands in just the same condition as the

maker of a promissory note to Eliza Jones. He is liable for the amount named in the note or bill, provided Eliza Jones has paid him any *consideration* for it, or done something, which is a gain to him or loss to her.[1] For, in all contracts between two parties, something must be given or suffered, by one party, as a consideration for what is done by the other. If it be not so, the note, bill or contract, of any description, will be void. A consideration having been given by Eliza, she has her legal claim or remedy against Thompson, the maker of the note or bill.

(160) Promissory notes or bills of exchange, made payable to bearer or order, are *transferred* in the same manner. Those payable to *bearer* are transferable from hand to hand, and the money must be paid to the holder. Those payable to *order* are transferable by endorsement. Instruments of this kind are said to be *negotiable.* The meaning of this is, that they may be transferred in this easy manner, from hand to hand, like money. After these notes or bills are transferred from the original holder, and got into the hands of third persons, who are ignorant of the transactions between the first two parties, the *consideration* cannot be inquired into. The holders are said to be innocent; and, in their hands, these *negotiable notes* have the characteristics of bank notes, and possession is apparent right. It is this power of easy transfer, and self-proved title against the maker and endorsers, which has made

[1] 2 Kent's Comm. 463.

this species of personal property much desired and valued among dealers in money.

(161) 5. There is a species of obligation, very similar to a bill of exchange, which is in every-day use among all classes of people, and passes as current, with people of property, almost as bank notes. This is called a *check*, and is usually drawn on banks. It is given by those who have money deposited in banks, to pay those whom they owe. They are simply orders on the bank, payable to bearer, and usually in a printed form. For example, Peter Niles pays Caroline Simpson twenty dollars in this manner: "Cashier of the Canal Bank, pay Caroline Simpson or bearer twenty dollars, for value received.—Peter Niles." Now Caroline is not obliged to receive this check, as her pay; because it is not what the law calls a "legal tender;" nor, has she any security in taking it, except the name of Peter Niles; for, if the Canal Bank has not got the money of Niles to pay this check, it is not obliged to pay it; and whether it has got money to pay it or not, Niles alone knows. Suppose, then, the bank does not pay it, what must Caroline do? She must go to Niles and demand the money. If it was a mistake, or otherwise an unintentional fault, Niles will pay the money or make a satisfactory arrangement. But if he will not pay it, this check is evidence of debt against him, and Caroline should proceed to make legal claim or suit against him. The point to be remembered is, that a check on the bank does not *oblige* the bank to pay. It is, like a bill of

exchange, drawn on a person who may, or may not, accept it.

(162) *The certificates of bank* or other corporate stock, are often made transferable in a particular manner, by the act of incorporation, or by the by-laws of the institution. In these cases, the stock must be transferred in the exact manner prescribed. In some cases, certificates of stock are made transferable by blank endorsement; and when so, the property is transferred from hand to hand, like promissory notes. This species of property is now very common; and is so easily transferred and managed, that it is much preferred, as an investment, by those who wish to sell or realize their money again, at an early period.

(163) Another species of personal property is *dress* and *jewelry*. This is considered as attached specially to the person. A woman is considered the owner of her own dress and jewels, even when married. The dress and ornaments which she has when married, however valuable, are called her *paraphernalia*. Of the law which regulates this, we shall speak under the head of Husband and Wife.

(164) 6. Furniture is a very important part of personal property; for, however small may be the amount, it is essentially necessary to house-keeping. We may say of furniture as of merchandize, animals, and the other enumerated kinds of personal property not mentioned above, that they may be transferred in two ways: 1. By possession. For he who has possession is assumed to be the owner, till the contrary is proved.

2. By what is called a bill of sale. This is simply a schedule of the articles of property sold, with a declaration by the former owner, that they have been sold to the holder. Such a bill of sale, accompanied by possession, makes a perfect title to furniture, merchandize or other personal property. A bill of sale may, however, be a good title, without possession of the property. If the sale be an honest one, and a consideration has passed from the holder to the seller, the bill of sale alone is title, without possession. This, however, is only between the parties themselves.[1] For if A were to sell B a bedstead or a piece of goods, and A, remaining in possession of it, were to sell it over again to C, C may question the title of B; and it is only by evidence of perfect honesty and fairness in the transaction, that B could hold the property. The reason is, that when A makes a bill of sale of his personal property, and remains in possession of the property, the law considers, *as to third persons*, that this continuing in possession is an evidence of some intended fraud; and therefore B, the purchaser, must make his title good, by showing the fairness of the transaction. When this is the case, B will hold the property, under his bill of sale, provided the other party has not yet got possession.

(165) For the security and comfort of families, the law of Ohio and several other States has a very humane provision in regard to furniture, domestic animals, books, etc. This provision exempts from execution for debt various articles of household use, with a view of preserving enough to keep a laboring family together. As

[1] 2 Kent's Comm. 523.

this exemption of household goods from execution exists in the law of many of the States, we will recite the principal features of the law of Ohio. The beds, bedsteads and wearing apparel necessary for the family are exempted from execution. The tools and implements of the debtor's trade; the bibles, hymn books and school books of the family; one cow, two swine, six sheep; one stove or cooking apparatus; provisions to the amount of forty dollars; and other articles, selected by the debtor, to the value of thirty dollars. When the debtor, as is frequently the case in towns, has no cow or other animals, he is allowed their value in money. This is a very liberal law, and in cases of improvidence a very salutary one to a family. It is particularly advantageous to women, who may thus retain their households and keep up the family.

(166) Merchandize, which is a name comprehending all that vast amount of goods of all descriptions sold in stores, is subject to the same rules of transfer as furniture or other personal property. As a general rule, possession is the first and strongest evidence of title. In the second place, it may be transferred by bill of sale. But in the transfer of merchandize from one part of the country to another, there arises a new and very extensive class of relations, between goods thus transferred and those who have a right of property in them, or some claims upon them. For example, A of Cincinnati buys goods of B in Philadelphia. B ships them with an invoice (that is, bill of sale) to A. The goods are, by contract, to be paid for before delivery, at Cin-

cinnati. The government may have an inspection or other tax, to be paid on this description of goods. Now, on arrival at Cincinnati, there might be four different rights of property in that parcel of goods: 1. There is the right of A, who bought them and considers them his own. 2. The right of B, who, under his contract, is to be paid before they are delivered, and therefore has a *lien* upon them. 3. There is the right of the common carrier, who brought them, and therefore has a lien upon them, till he is paid his transportation money. 4. And the lien of government for its tax or duty. This is a common case in regard to merchandize, and is sufficient so show that a very complex and extensive class of legal relations arise out of dealings in goods. This is one part of that great branch of modern jurisprudence, the mercantile law. It is unnecessary for women to study the details of this branch of the law; for, it is that with which they in general have the least to do. In the case above mentioned, the claims of all four of the parties in interest might clash, and each would have to assert his legal rights. 1. If A, acting in good faith, wished to get possession of the goods, he would of course have to pay B the purchase money agreed upon, and also pay the common carrier the freight, and the government the tax. This completes his right of property and right of possession. If A will not pay, then B or his agent must pay the common carrier and the government tax, in order to regain possession, and save himself from loss. If neither A nor B pay, the common carrier may sell

enough of the goods to pay himself. So the government asserts its right to keep or sell the goods, to pay the government duty.

(167) There are some other modes of transferring personal property, that of direct sale, or possession by delivery. 1. Property may be acquired by what is called *accession.* Thus if A hire from B a flock of sheep, the *increase* of the flock during the period of hire belongs to B.[1] So if A plant trees or vines, on the land of B, and they take root and grow, they belong to B; for the land is the principal and the plants the incident. But A may claim an equitable allowance as damages for the loss of his material. 2. Personal property may be transferred, as real estate, by an act of the law, a judgment or execution. If B by an act of trespass, a wrong, takes the chattel of A, the latter may have his action against B, and will recover damages; but his judgment for damages transfers the title of the article to B, the defendant; for, the judgment is, that he shall pay damages for it.[2] Again, if an execution issues against B, and it is levied on his personal property and that is sold; this property is, as in the case of real estate, transferred by operation of law. 3. Another species of transfer for personal property is that of an assignment, under an insolvent law. The United States have nearly, or quite, all passed insolvent laws; by which, if a debtor transfer all his property whatever to the insolvent commission and obtain his certificate, he is freed from arrest. By this assignment, all the inter-

[1] 2 Kent's Comm. 361.

[2] Idem. 387.

est of the debtor, legal and equitable, in property real or personal, passes to the commission.[1]

By such an assignment, however, the husband cannot transfer or affect the property settled to the separate use of the wife; nor can he affect property held in trust.

(168) There is another right or interest, in personal property, which is very common in modern business. It is the right in a policy of *insurance.* A policy of insurance is simply a contract, by which the insurance office agrees to pay the owner of property, whether real or personal, a certain fixed sum, provided that property should be destroyed in a certain manner. The consideration of this undertaking is the fee or premium which the party insured pays the insurers. If the property be not destroyed in the very manner mentioned in the policy, or if the owner destroys it, or is privy to it, the insurer is not liable. It is the necessity for the exact observance of, and the different constructions placed on, these rules, which cause the legal controversies frequently arising out of insurance cases.

The owner of a small amount of property ought invariably to have it insured, taking care, however, to understand especially the contract he makes. A wealthy person may afford to go without insurance; but a poor one should always insure.

The policy of insurance is transferable. If A sells his house, insured, to B, he can assign him also the policy of insurance. So if he mortgage it to D, he may assign D the policy, as a part of his security.

[1] Kent's Comm. 399.

Differences of Transfer in Real and Personal Estate.

(169) The above is a brief sketch of the modes of transferring personal property. The difference between the mode of transferring personal property and that of transferring real estate is, at last, a difference in the *evidence* required to prove title. In the transfer of real estate there are always certain *formalities* required to prove title. Whether by deed, by will or by execution, title to real estate cannot be proved without an exact observance of all the legal formalities required. A want of any one of these will prove a failure in title. On the other hand, personal property, being movable, and generally perishable, is not treated with so much formality. The sale of personal property is considered a less dignified and solemn transaction than that of land; and therefore the evidence of title is not required to be so exact and complete. *Money*, for example, however large in amount, is transferable and *current*, from hand to hand. *Furniture* and *domestic animals* have their title proved by *possession*, unless they are distinctly proved to have belonged to some other person. *Promissory notes*, *bills of exchange*, *due bills*, *checks* and *certificates of stock*, are transferred by a simple endorsement, where they are made payable to *order*; and where they are made payable to *bearer*, they are current from hand to hand, like money. *Merchandize* is sold by bills of sale, which are simple catalogues of the articles with a receipt for the money. In one word, there is no formality necessary to the transfer of property, except where a note or bill requires endorsement. If, for example, Eliza gives Caroline a table, and some one

claims it, Caroline can give the verbal proof of Eliza that she gave it to her; and if that be questioned again, other verbal proof may be given to show that, from the original maker to Caroline, the table has been honestly transferred. Nor can any better title be made out, except by the written sale and transfer of one of the original owners. Even that written sale may be questioned by any verbal testimony which goes to disprove its fairness. In the case of land, however, an authentic deed would be required; and when it is produced, it is unimpeachable, except for positive fraud.

(170) We have now closed what we proposed to do in this part of our treatise; which was (Article 8) to consider those general principles which apply in the same manner to women as to men. This we have done under the general heads:

1. Of natural law, Article 10.
2. Of revealed law, Article 11.
3. Of civil law, Article 13.
4. Of political rights, Article 25.
5. Of municipal rights of person, Article 33.
6. Municipal remedies to personal rights, Article 54.
7. The mode of holding real estate, Article 70.
8. The mode of transferring real estate, Article 84.
9. The mode of transferring personal property, Article 153.

CHAPTER III.

THE LAW OF MARRIAGE AND DIVORCE.

(171) MARRIAGE is the foundation of the family constitution. Without it, the relations of husband and wife, parent and child cannot *legally* exist. Hence it is the first fact in the order of the domestic relations we are to notice, and it is essential to correct knowledge of other legal conditions, that we should correctly understand this, and understand the light in which it is regarded by the law.

Marriage is an institution of God. It was begun in the garden of Eden[1] and has been perpetuated by the laws of nature, of religion and of civil society.

It was in its origin a religious institution; for it was solemnized in the presence and by the authority of the Creator. It was blessed by the Almighty in its original institution,[2] and by the Redeemer in the performance of his first miracle at Cana of Galilee.[3] It was also pronounced by the apostle, honorable among all men,[4] and has, therefore, been recognized by the laws, and held sacred in the respect of all Christian nations.

(172) In respect to the laws of civil society, *Marriage is a civil contract*.[5] It is, therefore, governed by the same rules which govern any other civil contract.

[1] Genesis 1: 27, 28. [2] Idem. [3] John 2: 1—12.
[4] Hebrews 13: 4. [5] 1 Blackstone's Comm. 433.

What a Contract is.

(173) Now to understand this, we must understand the meaning of a *civil contract.* The term contract signifies in law,[1] *an agreement, upon sufficient consideration, to do or not to do some particular thing.* This definition applies to all contracts, as well to those of sale and other business transactions, as to marriage. The term *civil* applies to the artificial laws of society and not to those of nature or revelation. The phrase, civil contract, then, means a contract recognized and governed, by the rules of the municipal or social law of the land. Such a contract is marriage. The *holiness or unholiness* of the matrimonial contract, in reference to the ties of blood and other moral circumstances is not considered by the law, but left entirely to the jurisdiction of ecclesiastical bodies, or the restraints of conscience. Nevertheless, for the sake of sound morals and public policy, the laws of nearly all Christian States do prescribe some limits of consanguinity, within which marriages may not be contracted.[2]

(174) The law allows a marriage like all other contracts, to be valid when, 1. The parties were *willing* to contract; 2. When they were *able* to contract; 3. When they actually *did* contract at the time of entering into that obligation, according to the forms required by the statute law.

(175) They must be mutually *willing*, because by the definition of a contract, it is an agreement. The

[1] 2 Kent's Comm. 449.

[2] The question which has recently agitated the Presbyterian church, "whether a man may marry his wife's sister" has nothing to do with the civil law. The *law* considers such a marriage *valid.*

parties must *agree ;* that is, there must be a *mutuality* in it ; for no contract is binding without the consent of both parties to it.

(176) They must be *able* to enter into the contract. Now there are several disabilities both natural and legal. 1. The *want of reason* disables a party from entering into the marriage state. An idiot or lunatic cannot *consent* to anything. He cannot, therefore, enter into an agreement by becoming a party to the obligations of a marriage contract.[1]

What constitutes idiocy or lunacy, can never be precisely defined ; but if one has no discretion in the common affairs of life, he or she, it is presumed, is not competent to enter into the marriage state. To ascertain this fact, it is common to refer the matter to the courts of law, though in the *theory* of the law, no such course is necessary ; for the law considers all marriages *in which the want of reason, or any other disability existed* to be absolutely *void*, from the beginning ; and therefore not requiring a decree of divorce. For the peace and satisfaction of families, however, it is usual to obtain a decision on that point, from the competent tribunals. The *proper courts* to try such questions in the several States are the courts of chancery, where they exist, as in N. York, or where they do not, the supreme court, as in Ohio.

(177) As a necessary consequence of the principle that *mutual assent* is necessary to the marriage contract, *force or fraud* make a marriage void ; for force,

[1] 2 Kent's Comm. 75.

which in law is called *duress*, renders all contracts void, because the mind must be *free* to yield a *voluntary assent*.

Force, or legal *duress* is of two kinds; 1. Duress of *imprisonment;* and 2. Duress *through threats*.

Duress by imprisonment consists in actual *loss of liberty*. Duress through threats is the *fear of the loss of life or limb*. The fear of being beaten or the fear of having a house burnt is not duress. The reason for this distinction, given by the law is, that for these, one may have an equivalent in *damages;* but for loss of life or limb, there can be no redress.[1]

(178) If then a contract of marriage is forced by *imprisonment*, or by *threats* of the loss of *life or limb*, such contract is absolutely *void*. This is the general rule in regard to all contracts; but in regard to marriage contracts, the law, it is presumed, would be very liberal in respect to what *was meant* by imprisonment and threats. The inclination of judges and juries of civilized countries is not to weaken the bonds of marriage once contracted; but it is strongly in favor of securing and encouraging women in the just exercise of all their natural rights.

(179) *Fraud* also renders a marriage void; but the fraud must be palpable, such as the substitution of one person for another and not a mere error of judgment; for as observed by Chancellor Kent, "the law makes no provision for the relief of a blind credulity, however it may be produced." Women, who think that either

[1] 1 Blackstone's Comm. 131.

character, condition, fortune or manners, have anything to do with the marriage state, must make their investigations beforehand, and in this respect had better trust their friends than themselves.

(180) When the law declares, as in the cases above stated, that a marriage is *void*, it does not mean merely, that the parties to it may be *divorced*, but simply and absolutely, that *the marriage* has never *taken place* and the parties stand just where they would have done if it had never happened. Yet, as we have already mentioned, it is usual to resort to the formal process of a court, in order to set the minds of families at rest.

(181) 2. A second disability, is *the want of age.* This is both a natural and a legal disability. It is obvious that there *is* an age, at which discretion would be wanting in respect to any contract. As this, however, varies in different countries and different individuals, the law has fixed an *arbitrary age*, before which marriage cannot be lawfully contracted. The age fixed by the common law, which is the law of England and of this country, (where the legislatures of the States have not changed it) is *fourteen* for boys and *twelve* for girls. At a younger age than this, they are not permitted fully to enter into matrimony. We say *fully*, because a marriage contracted *before* the parties have arrived at legal age, is *not*, as in the former case of disability, absolutely void; but merely *voidable*, that is, may be made void by the *subsequent acts* of the parties, when they come of legal age. Thus if two persons under legal age marry, when they come to legal

age, they may have their *election*, either to confirm or disaffirm the contract. So also, if one of them is under the prescribed age; as if a girl of eleven was to marry a man of twenty-five, she might when she came to be twelve, choose whether she would continue to be his wife or not. This rule is one which applies to all contracts made under age. Though it is the rule of the common law of England in respect to *non-age*, the same rule does not prevail in other countries, or even among the several States of this country. In France, for example, the age fixed by the code of Napoleon, is eighteen in males and fifteen in females. In N. York, the rule of the common law prevails. It was altered by statute, but the act was repealed, and the old rule reëstablished. In Ohio, the age is fixed, by statute, at eighteen in males and fourteen in females.

(182) 3. A third disability is, *the having another husband or wife living, and not divorced.* This is a legal, not a natural disability, and the *second* marriage is *void.* The having more than one wife is generally termed *polygamy*, and is alike opposed to the laws of God, and those of man, in all civilized and refined countries. In our laws it constitutes a crime called *bigamy*, and is punishable, by imprisonment in the penitentiary. To this general rule, there are, however, certain exceptions. 1. Where the parties have been *divorced*, they may marry again. 2. Where one of them has been *sentenced to imprisonment for life*, it dissolves the marriage contract. 3. Where the former marriage was made when either of the parties were

under the age prescribed by the law at the time of the marriage, and the contract was not afterwards affirmed. 4. Where one of the parties has been *absent* for five years in N. York, or three in Ohio and Connecticut, and *is not known* to be alive by the other.[1] This last exception, is one made by the statute laws of England,[2] and copied into the statute books of nearly, if not quite, all the States. But it must be remembered, that if there be no *statute* on the subject, nothing but a *divorce* by a court of competent jurisdiction, or the death of one of the parties, will authorize a second marriage by the other. *Wilful absence*, no matter for what length of time, does not justify a second marriage by the other; for this exception does not exist at common law. It is a statute provision, and even then to give it effect, the party deserted must have *no knowledge of the existence of the other*, for the whole length of time prescribed by statute, before he or she can marry again.

(183) 4. A fourth disability to marriage is, being *within the prohibited degrees of consanguinity.* It has been already said, that the law meddles not with the holiness of the marriage contract; but for the sake of sound policy, has prohibited marriage within certain degrees. For example, in Ohio,[3] New York,[4] Louisiana,[5] and it is presumed all the States, marriage between relatives nearer than first cousins, whether in the direct

[1] Consult the statutes of the particular States.
[2] Statute 1 James, ch. 11.
[3] Ohio Revised Statutes.
[4] N. York Revised Statutes, Vol. II. § 3.
[5] Civil Code of Louisiana, art. 97.

or collateral lines, is made criminal and punishable by statute. So also the same rule prevails in England and France. The basis upon which these provisions rest, is a clear and well-established rule of natural and religious morality.

The marriage of a woman with her deceased sister's husband, is expressly made lawful by the Statutes of Connecticut; but is, on the other hand, denied to be lawful by many divines and intelligent persons. It is, however, certain, that such a marriage *is valid* by the municipal law.[1]

(184) These four bars are all the *actual disabilities* to marriage; by which is meant, not merely the foundation of a divorce, but those things which render the contract absolutely void, and prevent any lawful junction of the parties. There are, however, many *requisites* to legal marriage, without which a *penalty* is placed upon the officers and ministers, accessory to such illegality, but which do *not avoid* the marriage.

(185) 1. *The consent of parents or guardians* to the marriage of minors is *not requisite* to the validity of the marriage, by the common law of England, or the laws of Scotland and Ireland, or those of Connecticut, New York, Ohio, or (it is believed) of most of the States. By this is not meant, that such consent is not, in some of the States, required to be made known to the officer or minister performing or accessory to the ceremony; but, as has been stated, that the want of such consent does *not make void* the marriage. It is one thing to require the person performing the ceremony to have

[1] 2 Kent's Comm. p. 85, note a.

such consent or pay a penalty, and it is quite another to make the marriage invalid. At a late period of English jurisprudence, however, by a statute of the 26th of George II, the common law was altered, and the consent of parents or guardians is now required, by the laws of England, to the marriage there. In Scotland, as we have said, it is not required. This is the foundation of the famous Gretna Green marriage. The parties fly to Scotland, where a marriage is valid without the consent of the parents,—are married, and return.

In Connecticut and Ohio, there are statute provisions affixing penalties to any violation of the statute requisites; as, for example, the performance of the ceremony by an unauthorized person, the want of a license, and the want of the consent of parents or guardians; but these penalties act only on the officers or ministers performing the ceremony, and *do not make the marriage without these requisites invalid.*[1] This is an important fact; because many marriages are really performed without this consent, and, in respect to the officers, against the law; but, sound policy and sound morals require that the marriage should not, therefore, be void.

(186) 2. *No peculiar ceremonies are necessary to the valid celebration of a marriage.* The notion that there are, is derived entirely from the innovations of the Romish church. With that, marriage is a sacrament; but among the early Christians, no such idea prevailed; and now, among nearly all civilized nations, marriage is, as stated above, a civil contract. The only ceremony used among the primitive Christians was for the man to

[1] Reeve's Domestic Relations, 199. 2 Kent's Comm. 85.

go to the house of the woman, and, in the presence of witnesses, to lead her away.[1] This seems like a summary process; but in fact the only legal foundation for marriage is *consent freely given, by two parties able to contract.* To enable the parties *to prove this*, there should be some witnesses present. A marriage thus contracted and consummated, by parties who are under none of the disabilities mentioned above, cannot be dissolved *by them*, and is as valid as if made in the face of the church.

(187) It is not necessary that a clergyman or any particular officer should be present to give validity to a marriage. The consent of the parties may be declared before a magistrate, or simply before witnesses. For many purposes (such, for example, as charging the husband with the wife's debts), the marriage may be inferred from the parties' living together.[2]

In the States of New York, South Carolina and Kentucky, the common law in this respect prevails, and no requisites are created by law. In the States of Maine, Massachusetts, Connecticut, New Jersey and Ohio, the statute law requires certain things; such as, that the ceremony shall be performed by particular officers, license to be obtained, consent of parents, etc. But in all these States, it is judicially recognized, that marriage *is valid, notwithstanding the omission of these requisites.*[3]

(188) The law of marriage is PART OF THE LAW OF NATIONS. The meaning of this is, that a marriage good

[1] Reeve's Domestic Relations, 197.

[2] 2 Kent's Comm. 87.

[3] Idem. 88, 90—91.

in one place or State, where contracted, is valid everywhere. Hence, if the parties leave a State where their union is unlawful, and pass into one where it is valid, and there marry, the marriage is valid on their return to the first State.[1] This principle legalizes clandestine marriages out of the State, provided they are lawful where contracted. The reason is, that much less inconvenience arises from this rule, than would flow from illegitimating the children and denying the lawfulness of such marriages. It is on this principle that the Gretna Green marriages are valid, although the marriage of the same persons would not have been valid in England. It is presumed, however, that from the general maxim, that *contracts against sound morals and public policy* are void, the marriage of *near relatives* would not be valid.

(189) Having now stated the general principles of the law of marriage, we shall briefly review the rules laid down. They are these:

1. Marriage is a civil contract.

2. All persons may enter into this contract who are: 1. Willing; 2. Able to contract; and, 3. The marriage is valid, when they actually *did* so contract. 4. Persons are not willing, and the marriage is void, when *force or fraud* are used.

3. There are four disabilities to the marriage contract, which render the parties *unable* to contract: 1. The want of reason disables a party from entering into the marriage state. 2. A second disability is the want of

[1] 2 Kent's Comm. 92. 16 Massachusetts Reports, 157.

age; as fixed, by the common law, where it prevails, or, by the statutes of the several States. 3. A third disability is the having another husband or wife living and not divorced. 4. A fourth disability to marriage is, being within the prohibited degrees of consanguinity.

4. The consent of parents or guardians is *not* necessary to make a marriage valid. But it is necessary, in most States, to secure the person performing the ceremony against penalties prescribed by law.

5. No peculiar ceremonies are necessary to the valid celebration of a marriage.

6. It is not necessary that a clergyman, or any particular officer, should perform the ceremony. The marriage will be valid if the parties only acknowledge the contract of marriage in the presence of a witness.

7. The law of marriage is part of the law of nations. A marriage which is valid in one civil community is valid in every other.

These are the principles which govern the law of marriage in the United States, so far as regards the union of the parties. The consequences which flow from this union, we shall consider under the head of Husband and Wife.

SECTION II.

OF DIVORCE, SEPARATION AND ALIMONY.

(190) Having considered how a marriage may be contracted, let us learn how it may be *dissolved*, and the *consequences* which flow from its dissolution.

What the Grounds of Divorce are.

And first, marriage is of *perpetual obligation*, unless dissolved, 1. By death; 2. By divorce.

Death, which dissolves all other ties on earth, dissolves also the marriage connection. For marriage, though blest by the Creator before and since the fall, is an institution of earth, and perishes with the body.[1]

(191) Divorce, by the Scriptures,[2] can lawfully take place only from one cause,—adultery. This is the only moral cause of divorce; but in municipal law several other causes are recognized. Generally speaking, these are causes which rendered the contract void from the beginning, as we have enumerated under another head (Par. 176), such as idiocy, fraud, having another husband living, etc. In such cases, the court or legislature do not pronounce a marriage contract *dissolved*, but simply that it never existed. Such a sentence, therefore, does not interfere with the Scripture rule; for, no *contract* is dissolved.

Some of the United States, however, as Connecticut and Ohio, and indeed in European States, as for example Holland and France, allow other causes (which are neither adultery nor those which make the contract originally *void*) to dissolve the marriage contract. *Wilful desertion* for a certain space of time, and cruel treatment are thus, in some States, made the grounds of divorce. In most of the States, however, this procedure is discountenanced, and it may well be doubted whether divorce from any other cause than adultery, has not greatly contributed to the moral evil of the world. Wilful absence and ungrateful conduct are hardly re-

[1] Matt. 22: 29, 30. [2] Idem. 19: 9.

garded, by the common opinion of the Christian public, as just causes of disgracing or disinheriting a son; and yet we are taught, in the Scriptures, that the marriage union is closer than that between father and son;[1] and are, moreover, expressly charged not to put away a wife from any other cause than adultery. The departure from this rule has occasioned the greatest possible diversity in this branch of jurisprudence, and made it difficult to ascertain what would, in all the States of the Union, be considered a just and legal dissolution of the marriage contract.

(192) The law has divided Divorces into two kinds, *total* and *partial*.[2] Total divorces are said to be *from the bonds of matrimony;* and partial divorces, *from bed and board.* In fact, the former only is a *divorce;* the latter is only a *separation.* The former annuls all the rights and duties, whether in relation to property or person, of husband and wife. The latter *separates* the parties, but leaves many of the consequences of marriage, in relation both to the legitimacy of former children and the use of property, still in force. In the former case, the wife retains no rights; in the latter she is entitled to alimony.

(193) The law which thus divides divorces into two kinds, *total* and *partial*, is the common law of England, but is by no means the law of all the States of this Union. On the contrary, the *diversity* in this respect among the several States of the Union is very great. This diversity we shall endeavor, as far as possible, to state.

1. In England, the courts which adjudicate upon

[1] Matt. 19: 5, 6. [2] 1 Blackstone's Comm. 440.

marriage are *ecclesiastical courts*, which are governed by the canon law, originally a part of the institutions of the church, and is still continued under the restraint and control of the common law courts.[1] The ecclesiastical courts took cognizance of marriage contracts, because the Romish church had declared marriage to be a sacrament; and, of course, it came properly within the domain of ecclesiastical discipline. Thus it was made, by the ambitious government of Rome, an instrument of drawing within its forum the persons and consciences of men. But, in the twenty-fifth year of the reign of Henry VIII. a statute was enacted[2] that a review of such *canons*, *constitutions*, etc. then in force in the ecclesiastical courts, should be had, and till then those in use and not contrary to the law of the land should still continue to be used and executed. Such review was never had, but the statute thus giving sanction to the canon law and its ecclesiastical courts, was confirmed and perpetuated by a statute in the first year of Elizabeth. This is the foundation upon which the canon law rests in England.

In the ecclesiastical courts there can be no total divorce, except for those impediments which made the contract originally void;[3] such, for example, as having another husband or wife, consanguinity, etc. They did not even declare a marriage void for adultery; but *that* with wilful absence, cruel treatment, and other like things, were causes of *partial divorce;* that is, of sepa-

[1] 3 Blackst. Comm. 87. Hale's History of the Common Law, ch. 2.
[2] 1 Blackst. 83.
[3] 1 Blackst. 434.

ration from bed and board. The parliament of England, however, frequently grant total divorces for adultery, when clearly proved. This is the present state of the law in England.

(194) 2. In the United States, the ecclesiastical courts have no existence. Ecclesiastical institutions are neither recognized by the Constitution of the United States, nor by those of the several States. The authority vested by the British parliament, in the canon law, over the marriage contract, is here restored to the municipal law. The source of that law is the State Legislatures, representing the people of the States. Hence, the jurisdiction over marriages and divorce, belongs to the State Legislatures or to those courts of common law to which they have intrusted it. Nearly all the States have enacted laws upon this important subject, though all have not conferred the power of granting divorces upon the courts.

(195) 3. In the States of Georgia, Alabama and Mississippi, there are constitutional provisions requiring the assent of *two thirds* of each branch of the legislature, after judicial investigation and decision by the courts of law, in order to make a divorce valid.

(196) 4. In the States of Delaware, Maryland, Virginia, Georgia, South Carolina, Alabama, Louisiana and Missouri, no divorce is granted but by *special* act of the legislature.[1]

(197) 5. In the States of Connecticut, Ohio and Illinois, all divorces are *total.* In Connecticut, divorces may be granted for *adultery, fraudulent contract* and

[1] 2 Kent's Comm. 105.

wilful absence for three years, or for seven years unheard of.[1] In Ohio, the causes are *adultery, having another husband or wife living, fraudulent contract, wilful absence for three years, extreme cruelty, gross neglect of duty, habitual drunkenness for three years,* and one other cause. To these also the legislature has added another civil cause of divorce, viz. *actual imprisonment,* in the penitentiary, for crime.[2] In Illinois, the causes of divorce are nearly the same, except that wilful absence need be but for *two years.*[3]

(198) 6. In the States of Massachusetts, New York and North Carolina, nothing subsequent to marriage, except adultery, is a cause of divorce. In the Western States, the laws of divorce are all very nearly the same with those of Ohio and Illinois. Except where there is a constitutional prohibition, the legislature of a State may always grant divorces.

(199) From these wide diversities of legislation in the several States, we see clearly enough, that no rule can be relied on when we depart from the Scripture precept, that no one shall put away his wife except for adultery. This was spoken, however, in reference to the Roman, which allowed a husband to put away his wife by his own act.

Several years' absence, cruel treatment or drunkenness, may be good cause of *separation* between man and wife; but are not sufficient grounds for a dissolution of the marriage contract. Indeed, in uncorrupted

[1] Reeve's Domestic Relations, 205.

[2] Revised Statutes of Ohio for 1841, page 291.

[3] Revised Laws of Illinois, 181.

states of society, no cause is deemed sufficient. During one hundred years of the colonial government of New York,[1] no divorce took place. So also in South Carolina none has taken place since the revolution. Under the Roman law, divorces were voluntary; that is, the Roman law gave the husband the privilege of putting away his wife when he pleased. Marriage, according to their maxim, was *free*. The evil of this principle, however, did not become manifest, till manners became corrupt, in the last days of the republic. Decrees were then made against this freedom of divorce; but the corruption of the times overcame the purity of legislation; and the law of unlimited divorce continued till it was subdued by the influence of Christianity.

(200) As to the EFFECT OF DIVORCES, important questions may arise under the Constitution of the United States. For example: if parties were *married in one State*, and either one or both move into *another* State, for the purpose of obtaining a divorce, what is the effect of that divorce?

The 4th Article, sect. 1, of the U. S. Constitution says: "Full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State." Now suppose that parties move out of a State where they could *not* be divorced, to one in which they *could*, for the purpose of getting divorced, and then *return;* would the first State be bound to recognize that divorce as valid? There are two decisions of the courts, which relate to this point, and which may be supposed in a good measure to settle it.

[1] 2 Kent's Comm. 97.

Consequences of Divorce.

1. If the divorce in the other State was obtained *without notice, by collusion,* or when the court granting it was, in any way, *imposed upon,* the divorce thus obtained is *void,* and the marriage remains in full force.[1] 2. The words, "full faith and credit," are decided to mean, that the judicial decisions of one State shall have the same effect in another, as they would have had in the State where made. Hence, it would seem, that if the courts of one State, *after full notice and examination,* decreed a divorce, for causes which would not have been sufficient in the State where the parties were married and to which they have returned; that divorce must *still be valid* there; for, otherwise, that decision would not have "full faith and credit."

(201) By the law of England, and by that of those States where divorces are not all *total* (as, for example, in New York, Massachusetts, etc.), partial divorces may be decreed. Partial divorces are said to be *from bed and board*; and they amount merely to a *legal separation.* The causes of divorce "from bed and board" in New York, are nearly the same as several of those which are sufficient for a total divorce in Connecticut and Ohio. For example, wilful absence for a certain length of time, cruel treatment, etc. are causes of total divorce in some of the States; but only from bed and board in others. In the provisions regulating the *effects* of divorces, this difficulty is in a great measure removed.

(202) The *consequences* flowing from either *total* or *partial* divorce are, by the law of England or common

[1] 2 Kent's Comm. 107—109.

law, very different; and it should be remembered, that this is the law of all those States in which there are no statute provisions. A *total divorce*, by the common law, *entirely dissolves* the marriage contract; so that nothing is any longer common to both parties, and the wife has no claims either for property or protection. But in a partial divorce, a wife is entitled to a separate maintenance, called *alimony*. This is a provision made by the court granting the divorce; and is to be rated according to the circumstances and rank of the husband.

(203) An important consequence flowing from the difference between total and partial divorces is this: in total divorces, the wife retains *no right in the real estate* of her husband. The contract on which it depends is dissolved. But in partial divorces, the rights of dower, maintenance, etc. in the property of the husband, *remains in full force.*

(204) As the States of Connecticut, Illinois, Ohio, and several others declare *all* divorces a *dissolution* of the marriage contract, it becomes necessary to guard against the loss of property by the wife, where she *was not the faulty cause.* These States have therefore enacted, that where the aggression was *on the part of the husband*, the wife should still retain her rights of dower, and be entitled to alimony and other rights of property.

(205) By the English law, also, children under the marriage were rendered *illegitimate* by a total divorce; but by our more humane law, it is *not so.* The States

How Divorce is obtained in a State.

have generally, by statute, legitimatized the children born under the marriage, but before divorce. If it were not so, an obvious and palpable injustice would be done.

(206) In obtaining divorces, the legislatures of some of the States have provided by certain enactments, independent of the *cause of divorce*, against too great a facility in dissolving the marriage contract. We have already seen that, as *full faith and credit* must be given, in all the States, to the *public acts*, *records* and *judicial proceedings* in each, a divorce obtained in one State, by parties moving into it from another for that very purpose, where due notice has been given, would probably be held valid in all. This, therefore, is one great facility offered to those, who wish to shake off the bonds of matrimony. Another exists in the fact, that persons are not unfrequently found, who would either create the cause of divorce, or confess themselves guilty of it, with the view of procuring a divorce. To guard against frauds of this description, there have been several legislative enactments. Thus in New York it is provided that, 1. One of the parties must be *an actual resident of the State.* 2. If the aggression be not committed in the State, the *marriage* must have taken place in the State. 3. If the marriage was not contracted in the State, the *aggression* must have occurred in it.[1]

(207) In Ohio it is provided, that the party complaining shall have been *one year* a resident of the State, before filing his or her petition; and *bona fide* a resident of the county in which the application is made.[2]

[1] New York Revised Statutes, Vol. II. sect. 38, 39.

[2] Ohio Statutes of 1841, p. 294.

(208) In Illinois it is enacted that no one shall be entitled to a divorce who has not resided in the State *one year* previous to filing the bill, unless the offence or injury was committed in the State.[1]

(209) In regard to the *evidence* on which a divorce is based, *confessions*, in Ohio, by statute, cannot be received *at all.* The testimony must be wholly disinterested. In New York, they must not be relied on *solely.* In Illinois, they must not be taken, except the court is perfectly satisfied of their sincerity. These points are usually settled by statute. If not, they follow the rules governing evidence offered in a court of chancery.

(210) The mode of proceeding in cases of divorce is, in Ohio, by petition in chancery, of which due notice must be given by publication in the newspapers. When the petition is heard, it will be decided, as in chancery cases, by the amount of evidence, on either side, before the court. Divorce being a subject of municipal law, the legislature has, of course, jurisdiction over such cases, and in many of the States, especially in the West, a great many divorces are granted by the legislatures.

(211) The principles of divorce as we have stated them, being reviewed, are these :

1. Marriage is of *perpetual obligation,* unless dissolved by either death or divorce.

2. Divorce by law is of two kinds, *total and partial.*

3. *Total divorce* is a *dissolution* of the marriage

[1] 1 Revised Statutes of Illinois, 182.

contract. *Partial divorce* is a *legal separation from bed and board.*

4. The law which thus divides divorces, is the common law of England, and the courts which, in England, have jurisdiction over divorces are ecclesiastical courts.

5. In the United States, there are no ecclesiastical courts. The jurisdiction over divorces belongs to the ordinary civil courts. The law of divorce is the municipal law, and is governed by the regulations provided by statute in the several States.

6. In these several States, there is great diversity in the laws regarding divorce. In most of the States, the *causes* for divorce are, 1. Adultery; 2. Having another husband or wife living; 3. Fraudulent contract; 4. Wilful absence for a number of years. In most of the States, these are causes of divorce. In some of the States, particularly in the West, these other causes are added: 1. Extreme cruelty. 2. Habitual drunkenness. 3. Gross neglect. In some of the Eastern States, as for example, N. York, N. Carolina and Massachusetts, nothing *subsequent* to marriage, except *adultery,* will be sufficient cause of divorce. The statutes of each particular State must be examined to obtain accurate information.

7. As to the *effect* of divorce, these two principles prevail as to different States: 1. If parties go from a State where the divorce would not be valid, there get divorced and return again, the divorce will be valid, *provided* the court granting it had due notice, made full examination and were not imposed upon. 2. The

divorce will *not* be valid, if it was obtained by collusion, without notice, or due examination, or the court was in any way imposed upon.

8. In total divorces, *the dissolution* is absolute, and the wife has no claims upon the husband's property.

9. In partial divorces, the court makes a provision for the wife, called *alimony*, and the same is done in total divorces, where the wife is *not the faulty cause.*

10. *Children* born before the divorce are by statute made legitimate.

CHAPTER IV.

THE RIGHTS, DUTIES AND LIABILITIES OF A WIFE.

SECTION I.

GENERAL IDEAS.

(212) Having discussed the manner in which the marriage relation may be legally formed or dissolved, the next point is, to consider what duties and liabilities that relation imposes on the respective parties to it. It might be said, that the duties of a daughter occur before those of a wife. This is true in one state of society. But it must be remembered, that the marriage state existed before any other in the social condition of mankind. It should also be recollected that the divine authority which created, made it the first in order, the highest in rank and the most sacred in nature of all the various and complex relations, which in the growth of families and the formation of nations could arise in the long prospective progress of human-kind. There was, as we observe there is in all other parts of the natural constitution of things, an imperative reason which made the wisdom of the law. Upon this relation depended the existence of the *Family*, the great, original, germinating association of mankind. On the family again, depended the existence, growth, progress

and perpetuity of nations. Finally, on these depended the expansion of numbers, the enlargement of intellect, the accumulation of social power and its conquest over the elements of nature, and finally, the moral restoration, which was the great object prophetically revealed, of this vast array of laws and means, physical, intellectual and spiritual. In the marriage relation was the germ of the whole. When Adam led his Eve from the gates of Eden, it was on this simple relation, depended the question, whether human nature should be, on earth, annihilated, or whether it should go on in that wonderful development, the most wonderful of all the mysteries of providence, which for six thousand years has produced a succession of multiplied beings little lower than the angels, expanded their minds with an almost inconceivable and illimitable power, returned their perishable bodies again to the dust from whence they came, opened to their departing spirits the vision of a resurrection in the likeness of their Lord, and impressed upon each living soul the angel attribute of eternal being. This was the vast display of wisdom, power and glory, which the Creator laid as a moral means, upon the marriage state. It was for this, that he gave it purity in the social relations, and invested it with unusual solemnity. The consequences have equalled the cause, nor shall we know the whole till the last act in the drama of humanity has been performed on earth.

(213) If there is any one thing which can portray, in language sufficiently strong, the closeness and holi-

ness of the marriage union, it is, that this union is used in the Bible, as a figure to denote the sublime and sacred union of Christ with the church. Marriage is the symbol repeatedly used to describe in effective terms, the harmony of beatified spirits with their Saviour, in the world of the redeemed. It is true enough that the full force and meaning of that figure cannot be realized on earth ; but it is the sublime moral of the high calling, to which, not only the church, but the family is called.

(214) Out of this sacred relation, spring all those other relations which, in their several orders and degrees make up the affinities of civilized society. It is this priority, which brings us first to consider here, the rights and duties of a wife, before we consider those of the daughter and the mother.

(215) The law which we are about to trace, in regard to this domestic relation, can only touch, as it does in all other relations, the *exterior* concerns of husband and wife. It is too narrow in its jurisdiction and too imperfect in its knowledge, to determine, regulate, or constrain those internal affections, upon which, at last, the whole harmony and efficacy of the marriage relation depends. Too many expect from the law more than the law can give.

SECTION II.

WHAT LAW GOVERNS THE MARRIAGE RELATION.

(216) In Christian countries, and with Christian

people, the revealed law of God, so far as it applies to the relations of society, is the only true foundation of human laws. Civil obligation in relation to things permissible and indifferent, may indeed exist *without*, but *not in opposition to it.* Hence, it is proper here to recite a few of the leading principles of Scripture, in regard to the duties of husbands and wives, in order that we may observe hereafter, *how far* the law of man has grown out of, and been made in conformity to that of God.

1. *Scripture regards husband and wife, as one person, and not to be separated save for one cause.*

Jesus said, *He* that made them, at the beginning, made them male and female. For this cause shall a man leave father and mother, and cleave unto his wife, and they shall be one flesh, Matt. 19: 4—6.

And whoso marrieth her that is put away doth commit adultery, Matt. 5: 32.

2. *Scripture teaches, men must govern their families, and women submit to their lawful requisitions.*

Wives submit yourselves unto your own husbands as unto the Lord; for the husband is head of the wife, even as Christ is head of the church, Col. 3: 18; Eph. 5: 22—24. Refer to Eph. 5: 33; 1 Tim. 2: 11—13; 1 Pet. 3: 1.

3. *Scriptures teach, that the person of the wife belongs to the husband,* 1 Cor. 7: 3—5.

4. *Scriptures teach, that the husband must give to the wife his perfect and absolute love and confidence.*

How the Relation of Husband and Wife is considered.

Husbands love your wives, even as Christ loved the church, Eph. 5: 25—33.

5. *Scriptures teach, that the husband must honor the wife and dwell with her, according to knowledge,* 1 Pet. 3: 7.

6. *Scriptures teach, that the person of the husband belongs to the wife,* 1 Cor. 3: 7.

It has already been seen, that in most countries, the law of divorce has departed widely from the principle, that adultery only, is a good ground of separation. The history of those countries, and the record of those States, in which a contrary principle has prevailed, will show beyond controversy, that departure has added to, rather than diminished the stock of human misery and the means of human corruption.

(217) The first great principle of Scripture, the unity of husband and wife, is repeated by the law. They are *in law, one person.* This great principle has, therefore, all the authority of human and divine law. This fundamental principle should be borne in mind, throughout this investigation; for upon it, as observed by Blackstone, depend nearly all the legal rights, duties and disabilities, acquired by marriage. And it should be further borne in mind, that many of the laws, which seem severe and harsh towards women, are but necessary and inevitable results of this principle. There will be enough found in the unequal, and in some respects, barbarian legislation of man, to make the ground of just complaints, without impugning a principle or its effects, which God has not only laid down, but made necessary to the organization of the sexes.

How the Relation of Husband and Wife is considered.

(218) After the Scriptures, the law which prevails over the marriage relation is the municipal law, which as in the case of marriage and divorce, is either the common law or the statute law of the States.

There have been many ways of considering the laws which pertain to the condition of husband and wife; but I shall treat of them, in a mode somewhat different from either.

I shall discuss:

1. The unity of the marriage relation.

2. What a woman *loses* of personal control by marriage.[1]

And 1. Of person. 2. Of property.

3. What she *acquires* by marriage.

And 1. Of person. 2. Of property.

4. The chief difference between the rights and duties of a husband, and those of a wife.

5. The amendments made to the laws of England, in relation to wives, by the code of the United States.

(219) This classification is adopted for clearness and convenience, and not for the purpose of suggesting new theories or proposing sudden innovations. My object is *wholly practical;* to give an exposition of the law *as it is,* that they who are interested in it, *may,* if they please, render the legal relations of husband and wife.

(220) We remark here, 1. That if any person supposes that long-established errors, either of custom or

[1] The term *personal control* is here selected, because husband and wife being *one* in law, she is supposed to lose *nothing in interest,* the husband acting for their common benefit.

legislation can be suddenly corrected, they are greatly mistaken. Human nature and the modes of social action will not permit it. Government, laws and institutions are, to society, what clothes are to the body. They must *fit*. One can never be *perfect*, when the other is *deformed*. The municipal law is what civilization, religion and science have made it; and not till the perfect law of love shall pervade society, may we hope to see the day when the oppressed shall wholly go free. But when that day does come, on the other hand, there will be no need of legal restraint; for all men and all women will do right. 2. It is an invariable maxim of the law, that *ignorance does not excuse;* and though in practice it is true, that full nine tenths of mankind *are* ignorant of the first principles of the laws by which they are governed, yet the rule is immutable. It is, in fact, founded on obvious reasons. The law supposes that its subjects *may be*, if they are not, acquainted with its requisitions. Besides this consideration, it is plainly impossible to determine the *degree* of the delinquent's ignorance, or whether in fact he was ignorant at all.

3. The civil law does not act upon or measure *motives*. It has no power to act upon anything but external conduct. Hence it is incapable of doing that *moral equity* which is often *sought* to be done, and therefore by many persons is expected to be done; but which it is impossible the law should do, unless it continually changed with circumstances, or had the power of *spiritual sight* into every heart. As a counter balance on the side of the law, every person who

chooses his condition, or profession, or conduct in civil society, *knows* or may know, what the law is in relation to that subject, and therefore acts knowingly, and is properly responsible to the tribunal of the law.

SECTION II.

THE UNITY OF THE MARRIAGE CONDITION.

(221) The religious unity (as we have already noted, Art. 218) of man and wife, is declared both in the Old and New Testaments. The civil law of the United States declares that, in the view of that law, the marriage relation constitutes a legal unity[1] in all its conditions and circumstances. No one supposes that, in personal or spiritual *identity*, they are in fact one; but that in interest, in action, in family government and in possessing rights of property, title and claim, they shall be considered *one*, and no diversity is supposable. The great object in this is to secure the unity of family support and family government; for, on any other supposition, the family would be divided against itself.

(222) As the marriage creates a unity, and the husband is religiously the head of the family,[2] the law declares, that the external powers of this family, in respect to property and government, shall vest in the husband. There are exceptions to this rule, in two instances: 1. Where the security of the wife's person requires the intervention of the law, as in the case of crime.

[1] 1 Blackstone's Comm. 442. [2] Idem.

2. Where the legal title to property is in the hands of trustees, and the use in the wife; in which case, the property is treated as the wife's only.

This *merging*, as it is called, of the wife's rights of property and person in the husband, has been called little less than downright slavery. In this respect the Roman law was much more liberal than the English or American. For that law considered marriage as a sort of *partnership*, in which each partner had equal rights of property. We consider here, however, not the propriety, but the facts of the law; in order that women may know what it is.

(223) As a direct consequence of this principle of unity between husband and wife, they can make no contracts with each other which will be legal;[1] because, to make contracts with one another is to suppose their separate legal existence, which is contrary to their declared unity. A husband cannot make a grant of land directly to his wife; and if there were any contracts between them before marriage, they are void. There is another reason for this rule; that is, that if there were any agreement between them, there are no means of enforcing it; for, whatever the wife has, under any such agreement, is already the husband's.

To this general rule there are, as to most other general rules, some exceptions; or, as they might be called in this case, *avoidances*. 1. The husband can convey a separate estate to the wife's use, through the medium of trustees. He cannot convey the *legal title* to her; but he can convey it to trustees to her separate use,

[1] 1 Blackst. Comm. 442.

and a court of chancery will enforce that separate use.[1] 2. If a husband, to encourage the industry of his wife, engages to allow her a certain part of the avails of it, the court of chancery will enforce that agreement. 3. Agreements to live separate and apart, and to allow the wife the use of her property, are now enforced. This is true, it must be understood, only where the agreement to live separate appoints trustees; for it is only through the trustees, that the court of chancery obtains jurisdiction. So far as the trustees have duties to perform, the agreement will be enforced; but it is strenuously affirmed that the agreement will not be sustained for any other purpose.[2] This is one of the points concerning the legal relation of husband and wife, in which there is a good deal of difference, both in decisions and opinions. In a case argued before the twelve judges of England, it was decided that *no agreement* between husband and wife could change their "legal relations and capacities."[3] This is true; but whenever a *trust* is raised, as in the exceptions above mentioned, the court of chancery will take jurisdiction and enforce the trust. It is only *as a trust* that any agreement between husband and wife can be enforced.

(224) As another consequence of the unity of husband and wife, they cannot be witnesses *for or against each other*.[4] The reason of this is, that if they testify *for* each other, there is too much bias in interest and temptation to swerve from the truth; and it is against the policy of the law and sound morals to allow them

[1] 2 Kent's Comm. 129.
[2] 3 Hill's New York Reports, 399.
[3] 8 Term Reports, 545.
[4] 1 Blackst. Comm. 443.

to testify *against* each other. The law will not *permit* them to testify against each other.

(225) The only exceptions to this rule are those of absolute necessity. 1. In England, it is said, that if the husband be indicted for high treason, the wife is a competent witness against him. This is for the safety of the State. This is a doubtful point, however. 2. When a wife complains against a husband, for assaults or other force towards herself, in order that she may have protection, she is allowed to testify against him; for she is the only one who could prove the case. It is a matter of *necessity*. 3. When the husband is prosecuted by the State for abuse of his wife, she is a good witness, for the same reason as before. 4. If a man forcibly compel a woman to marry him; or if he marry a woman, having a wife already living; the woman may testify against him; for in both these cases, the marriage is really void; in the first for fraud, and in the second for bigamy. 5. When a man is charged with the murder of his wife, her dying declarations of his guilt may be proved against him. These cases are, however, not so much exceptions as matters of necessity. They are all cases of violence or fraud. The general rule remains substantially true, that husband and wife cannot testify either for or against each other.

(226) These are the great consequences which flow from the principle of *legal unity* between husband and wife. They are vastly momentous to both, but to the wife especially; for it is plain enough, that in respect to property and legal identity, her being is, in a great

measure, merged in his. We shall now consider, more specifically, what she loses or gains in respect to person or property.

SECTION III.

WHAT A WOMAN LOSES OF CONTROL OVER HER PERSON BY MARRIAGE.

(227) We have already noted that the Scripture declares that the person of the wife belongs to the husband.[1] This might be said to be fairly included in the very terms in which her creation was described. She was created to be "meet," that is, *fit* for man, her husband, and with the view of becoming his perpetual companion. To be separated from him, or, having become his wife, to live in an independent personality, is really to be exiled from the purposes of her being. This certainly is the view both of Scripture and the law. Nor is the rule laid down with any inequality or unfairness; for, while they continue in the marriage state, whatever may be the husband's right to her, she has the same to him.

(228) It follows, from this rule, that if a wife leave her husband, he has a right to reclaim and bring her back. It follows also, that if she attempt to leave him, or is guilty of improper conduct, he has a right to control and constrain her liberty; provided always this is done gently and with no violation of the criminal law.[2] For we have already shown that women are citizens

[1] 1 Cor. 7: 3—5.

[2] 1 Kent's Comm. 181.

(Art. 26), and, as such, entitled to all the remedies of the criminal law. But the husband has and must have, as the head of the family, the right to constrain the liberty of his wife, so far as is necessary to preserve the peace, unity and safety of the family. There are many ways in which this might be endangered by the conduct of the wife. Intemperance is one. Temporary insanity, or a lightness of conduct almost equivalent to it, or, very vicious and criminal conduct. The husband has a right to use preventive means with the wife, to a certain limit; when, if it fails, he must either commit her to the hands of the law, or separate. The converse of this is, in some degree, true also; that the wife may take some measures to prevent the wrongs of the husband; but it is not true to the same extent. As a general rule, the husband has an entire right to the person of his wife, and may use gentle means to constrain her liberty.[1] But if that restraint be cruel, unreasonable or improper, she has her right to a release on *Habeas Corpus*.

(229) The husband's right to the person of his wife, includes a right to preserve the purity of her conduct, and to certain remedies for the violation of it. A husband is justified in using force in defence of his wife; and it is said that homicide is justifiable in such a case.

(230) The husband having a right to the person of his wife, has the sole right to the remedies for legal wrongs committed against her person. It is true, the State prosecutes for public crimes against her, as against all citizens. But so far as there is a personal remedy

[1] 1 Blackst. Comm. 445.

at law, that remedy ensues to the husband. He, for example, has a right to an action for damages, in case she is assaulted. It is true also, that she must be formally joined, in some actions of this kind; but she cannot sue *alone*, and therefore she has lost all personal control over the right of action. She can bring no action without her husband's concurrence.[1]

(231) So also she has not the personal power, *alone*, to execute a deed or other legal instrument, which shall bind herself or her property. All such instruments are void.[2] The reason given for this is, that she acts under the *compulsion* of her husband. But this supposition is contrary to the idea of unity, which the law maintains; for it assumes her inferiority. The better reason is, that that very unity requires that she should not act alone, but in conjunction with her husband.

(232) To this general rule there are some exceptions. We have already said that in some of the States a wife may make a will or devise of her property (Art. 135). This is the case in Ohio. Again, if her husband has "abjured the realm," as it is called, she may sue and be sued alone.[3] This is necessary for her very existence, as she is entirely cut off from her husband. This principle applies to the wife of an alien residing abroad,[4] or to the wife of a man who has left her and gone into foreign countries, intending to remain permanently.[5] So also, if the husband is transported for a crime, she is considered as a single woman, and may act as such.

(233) In fine, it appears that the husband's control

[1] 1 Blackst. Comm. 443. [2] Idem. 444.
[3] 1 Kent's Comm. 154. [4] Idem. 155. [5] 4 M'Leod's R. 148.

over the person of his wife is so complete that he may claim her society altogether; that he may reclaim her if she goes away or is detained by others; that he may use gentle constraint upon her liberty to prevent her going away, or to prevent improper conduct; that he may maintain suits for injuries to her person; that he may defend her with force; that she cannot sue alone; and that she cannot execute a deed or valid conveyance, without the concurrence of her husband. In most respects she loses the power of personal independence, and altogether that of separate action in legal matters.

She does not lose, however, her personal responsibility for moral action. She has the rights of conscience as fully guarantied to her as to any other citizen. Her husband has no more right to constrain her to any particular form of religion, or to compel her to any criminal or vicious act, than he has any other citizen. She has her remedies, as much as any other citizen, against his illegal acts. If he constrain her liberty for a wrong purpose, or in a cruel and unreasonable manner, she has her right to the writ of Habeas Corpus. If he use force towards her, she has a right to charge him in a criminal suit, and to have him bound to keep the peace.

It is true, that so intimate is the marriage relation, so strong the ties, and so easy the means of annoyance by one party towards the other, that moral *duress* is often stronger than any constraint upon the person could be; and this sort of constraint is beyond the jurisdiction of the law. This is true; but it is not the

fault of the law. The law cannot, in the nature of things, reach anything but the external actions of mankind; and if there be a sort of moral compulsion towards unhappy and unrighteous conduct, arising from the relation of one party to another, and the pressing motives which grow out of that relation; the law of society, acting only on visible and tangible objects, cannot remedy the evil. It cannot remove the moral motive which acts upon the mind. It follows, then, that there is a large class of cases of misconduct of husbands and wives towards each other, which no human law can reach, and for which it is in vain to expect any power of society to furnish a remedy. So far as there are visible acts of cruelty, constraint, violence or crime towards wives by husbands, the law furnishes the same remedy for them as for others. The difficulty is, that in so delicate a relation, complaint is seldom made; and a permanent remedy cannot be applied without a dissolution of the marriage contract, a resort which should never be encouraged.

SECTION IV.

WHAT A WOMAN LOSES OF CONTROL OVER HER PROPERTY BY MARRIAGE.

(234) It would not be very far from being a proposition universally true, to say, that by marriage, all the wife's property becomes the property of the husband. It is certainly true, that all the *beneficial interest and*

power over it, goes to the husband. It follows, then, that she loses the entire *personal control* over her property so long as the marriage continues. As, however, there are great differences between the change which marriage produces in the wife's personal property and in her real estate; and also in the relations, which her property afterwards bears to creditors and heirs, it is necessary to review those changes specifically:

(237) 1. *The personal property of the wife*, as such, in her own right, such as money, goods, animals and movables of all descriptions, vests at marriage, immediately and absolutely, in the husband.[1] He can dispose of them, as he pleases, and on his death, they go to his representative, as being entirely his property. Or if he were in debt, his creditors can take them in execution. For example, if Caroline Niles have ten thousand dollars in bank stock, and marry Peter Jones, the whole of that stock belongs to Peter Jones. If A. B. then, recover a debt against Peter Jones the week after the marriage, he can sell this stock as the property of Jones. Again, if Caroline die the day after the marriage, this property remains exclusively the husband's; and if he die on the day after her, the whole property goes to his heirs. The effect of this marriage, then, would be to transfer all of her personal property from her heirs to his. This is an extreme case; but it illustrates perfectly, the effect of marriage in the personal property of the wife. That effect is, to make a complete transfer of all her, and her heirs' rights in that

[1] 2 Kent's Comm. 143.

property, to him and his heirs. If they have children, the heirs of one will be the heirs of the other, and the property takes its natural course. But if not, its original use and descent is entirely changed.

(236) 2. *Of the wife's rights to property not yet in possession.*

These are called in law, *chores in action*; by which is meant, things which require some act to bring them into possession. Such property are bonds, notes, arrearages of rent, residuary legacies, debts due, etc. The *control* over these, also, passes entirely to the husband. That is, he has the right to receive, sue for and convert them to his own use.[1]

But though the control over them passes to him immediately, the *property* in them is not absolutely his, without the performance of some act on his part. Marriage is only a qualified gift to the husband, of *things in action.* They are his, upon condition that he *reduces them into possession,* during the marriage;[2] for if he die, for example, before he has collected a certain note of his wife's, that note, on his death, does not go to his heirs or representatives, but to hers. Thus, if Eliza Wilson marry James Porter, having a note of one thousand dollars due to her in two months, and James Porter die before that note is due, as he has not had it transferred to himself, that note will belong to Eliza Wilson and her representatives, not to his representatives.

(237) The husband may also release and discharge

[1] 2 Kent's Comm. 135.

[2] 1 Roper on Husband and Wife, 202.

the things in action, belonging to the wife. That is, James Porter may give a receipt for a thousand dollars due Eliza, his wife, and it will be legal.[1] But if he die before he has received, released or otherwise changed the debt, his wife Eliza, will be entitled to the debt, and not his representatives.

(238) If Eliza Porter die before her husband James, he has the right to become the administrator upon her estate, and by virtue of that administration to hold all her personal property, things in action as well as things possessed ;[2] and on her death, they all go to his representatives.

(239) The husband, however, cannot *bequeath* his wife's things *in action*, so that she shall be deprived of them on his death ; for that act does not take effect during the marriage.

(240) The wife's things *in action* are not liable for the husband's debts, if she survives him; because he has not converted them, and as they belong to her, they cannot be seized for his debts.

(241) If the goods of the wife are in possession of a third person, by finding, hiring, conveying, keeping, etc., they belong to the husband absolutely; as for example, carriages hired out, furniture or goods in store, or money on deposit. But if the holder of her property has converted it to his own use, it does not pass absolutely to the husband ; because it is then *in action.* The wife cannot recover them without a legal act, and

[1] 1 Roper on Husb. and Wife, 202. [2] 2 Kent's Comm. 135.

they will not be the husband's, till he has converted them to his use.

(242) It may be asked, what acts must the husband perform, in order to convert the property of his wife *in action* to his own use? 1. If he really collect and convert it into money, in the case of notes, rents, legacies, etc., it will be his. 2. He can *assign* the right to it, for valuable consideration to others, in which case, they get a perfect title, and he receives the proceeds.[1] 3. He can sue for them, and when he recovers judgment, it is such a conversion of the right of property, that the judgment belongs to him.[2]

(243) 3. *The wife's property in chattels real.* Chattels real are rights in, and springing out of such lands, as are not freeholds. A lane is the best example of a chattel real, and almost the only real one. Lanes, however, are very numerous and often very valuable. They make up a large portion of the general property, especially in cities.

This class of interests (chattels real) becomes the husband's on marriage. They are an existing, positive, possessory title, and therefore they are his by marriage, without any further act of conversion or conveyance. He can sell, assign, mortgage or otherwise dispose of them, as he pleases.[3]

(244) Chattels real belonging to the wife may be taken in execution for the husband's debts,[4] and if he survive his wife, the law gives him the chattels real.

[1] 2 Kent's Comm. 137. [2] Idem. [3] Idem, 134.
[4] 1 Roper on Husb. and Wife, 182.

(245) There are some things, however, in which his title to a lane or other chattel real, is not complete. For example, he cannot devise them by will, and if the wife survives him, they become hers again, and are not liable for his debts incurred in his lifetime.[1]

(246) 4. *The wife's property in lands.* A freehold interest in lands, we have already said (Art. 75), is of two kinds; 1. A fee-simple, which is the entire interest, and 2. A life estate, which is the right to the lands, for a life, it may be of the person holding it, or of some other person. In an estate in lands, the husband does not acquire an absolute title. In fact, he acquires no title at all. But he does acquire, what for his life is equivalent to it, the entire control over it, and the entire use of the rents, issues and profits.[2] If it be an estate for life or a fee-simple, he has the same power. He enters, by marriage, into possession of the wife's real estate, has the power to manage it, and finally, the entire use and profit of it.

(247) The *title*, we have said, he does not get. For example, if Caroline Niles on her marriage with John Stokes, held one hundred acres of land in fee-simple, the husband does not, by marriage, get title to that land, and he cannot sell it, but he can rent it and take the rents. Caroline and her heirs cannot be deprived of the title and descent to that land, by any act of John Stokes. If he die, both the title and the use are hers absolutely. If Caroline be willing to sell and part with the land, she and her husband must join in making the

[1] 2 Kent's Comm. 134. [2] Idem, 130.

deed together. In most of the States, she must be examined separately and apart, to show that her mind is free, and she is not under coercion. Great numbers of women, however, have parted with their property, to the great distress of themselves and the great loss of their heirs. This too has been by coercion, but it was a moral coercion, which the law could not reach. They have been over-persuaded, or acted under the fear of greater evils.

(248) The inheritance of a wife's fee-simple in lands, varies according to the relative circumstances of the family. 1. If the husband die before the wife, her estate in lands, of course, in use and title, is hers alone, and descends to her heirs. The husband cannot, without her consent, divest it or incumber it. 2. If the wife die before the husband, having had no child capable of inheriting the estate, it goes immediately to her heirs. 3. If the wife die before the husband, having had a child born alive, (whether it be alive at her death or not), the husband has the entire estate for life by what is called the *courtesy*, and after his death the fee-simple goes to her heirs.[1]

(249) The interest of the husband in the wife's estate, whether during marriage or during his life, as the case may be, may be seized in execution by his creditors.[2] But both the husband and the creditors, who may be in possession by virtue of his right, are responsible for any permanent mischief done the estate. They cannot commit *waste*, as it is called. That is,

[1] 2 Kent's Comm. 131. [2] Idem, 132.

they cannot destroy timber, buildings, roads, fences, etc., which are permanent improvements, and belong to the inheritance. They are entitled to the *use* and no more.

(250) Over the wife's real estate, in the hands of trustees, to her sole and separate use, the husband has no control, and no right of any kind. This is a species of property which the law allows to be created for her benefit, and which the court of chancery will enforce to the full extent. Trust estates for the benefit of a married woman may be created in several ways. 1. The father of children may make either a deed or devise to trustees, for the benefit of his daughters, the trustees to hold it for their separate use, and benefit, and to their heirs after them, provided it does not interfere with the statute against entails. In lands thus secured in the hands of trustees, the wife has the absolute property and control. It is true, that when the rents and profits of such lands are collected and actually in her hands, it is like other personal property and belongs to the husband; but she may avoid that, by directing the trustees to what purposes it shall be applied. 2. Either the father or the intended husband, on the eve of marriage may create a trust estate for the benefit of the wife, in the hands of trustees, and direct the manner in which the rents and issues shall be applied. Such an estate and act as this, is called a marriage *settlement*. This kind of property is very rare in the United States, and very common in England. It is rare in the United States for three reasons. First, because the

family consequence is not so much regarded, or rather the aristocratic feeling is not so common as in England; next, because marriages in the United States are based almost entirely on affection, with very little regard to interest; and lastly, because the parties are usually married very young, when the husband has much less prudence than after experience is apt to give him. To this, it may be added, that the subdivision of property into small quantities, affords the fathers and husbands much less power to make marriage settlements.

(251) Is a marriage settlement, however, where the father or the intended husband has the power to make it, anything more than a measure of prudence, which common sense plainly dictates? Is not a suitable provision for the wife and future children, if fairly and honestly made, a most desirable thing? Is it not desirable for the community, that families should be provided for? Is it not security against those vicissitudes of life, which in no age or country have been more common, than in those in which we live? The indelicacy, if it be so sought, is entirely avoided, by the fact, that this business is one attended to by the father or some other friends, without any interference of the woman about to marry.

(252) 3. Husbands, as we have already said, may convey lands to trustees for the use of their wives. He cannot convey lands to her directly, but he can to trustees, secured to her sole and separate use. And this also is a measure which would go far to secure the

peace and comfort of families, if it were adopted by men of business in the days of their prosperity, when they might do it, fairly and rightly.

(253) We have now reviewed the specific manner in which property by marriage passes from the wife to the husband. It amounts to an almost total change from one to the other. As to *personal control* over her property, the whole absolutely passes to the husband. She has none of it. In a single case, she can manage for herself, so far as to appoint the use of property, and that is the case just referred to, where lands have been conveyed to trustees, for her sole and separate use.

(254) The personal control of her property passes absolutely to the husband; but the right of property does not pass altogether. The order and degree of his rights, as we have just reviewed them are these: 1. In her personal property, money, goods, etc., he has the entire right of property and control. 2. Over her *things in action*, (those which require some legal act to be done, in order to possess them), he has the whole control, but not the right of property, till he has, by that act, converted them to his own use. 3. Over chattels real, (such as lanes), he has the whole control and the whole right of property, except he cannot devise them away, and if the wife survive him, they go to her again. 4. In lands, he gets no title, but he has the sole use during their joint lives, and if she had a child born alive and he survive her, he has a life estate in her lands; but the fee-simple always goes to her heirs.

SECTION V.

WHAT RIGHTS OF PERSON THE WIFE ACQUIRES BY MARRIAGE.

(255) It might be thought, from the sweeping transfer which the law makes of the person and property of the wife to the control of the husband, that she had acquired nothing by marriage. This is not, however, strictly correct. She does acquire some things of great importance. In relation to her *person*, she acquires, 1. Protection; 2. Maintenance. If the first, in a civilized country, should not be needed, the second is in all nations, of no small consequence. As a general rule, the maintenance of the wife and of the entire family devolves upon the husband as head of the family. It is his *duty* legal and moral; and it is the corresponding *right* of the wife to demand it. The cases in which the wife has brought property enough to support the family; or in which the husband, from sickness or incompetency, is unable to support it; or when from his vices, he has been disabled or is unwilling, are few, compared with the great mass of families, in which the husband, by his labor or his property does, in performance of this great moral and legal duty, support the household. There is no doubt, that the wife renders, in the vast majority of instances, services fully equivalent to what she receives. It is her duty to render these services, and it is his to maintain the family.

(256) In respect to protection, personally, the hus-

band is justified in using the same violence to protect his wife, that he could to protect himself. He has a right to interfere in all those invasions of her right which would have been invasions of his, had they been offered to his person or property. He is bound also to protect her by shelter, aid and comfort, in all those ways in which such aid and comfort are necessary, by the usages of civilized people.

(257) The law also goes a little beyond mere protection. It makes the husband liable for all the wrongs and frauds of the wife, committed during marriage.[1] If the wrong be committed in his company or by his order, he alone is liable. If not, they are jointly liable. Where the remedy for the wrong is by a suit for damages only, the husband is liable with the wife. But if the remedy be sought by imprisonment or execution, the husband is alone liable to imprisonment. Again, if the wrong is to be punished *criminally* by imprisonment or otherwise, the wife alone is to be punished, unless there is evidence of coercion from the husband. The presumption of the law, however, is carried so far as to excuse the wife from punishment for theft, committed in the presence, or by the command of her husband.[2]

(258) The great personal right which the wife acquires by marriage is the *right to maintenance.* In general, the duty of the husband in this particular, is cheerfully performed towards the wife and towards the family, by sharing with them all the fruits of his acqui-

[1] 2 Kent's Comm. 149. [2] Idem, 150.

sitions; and, should he die first, leaving them his heirs. In the great mass of families there is no difference of opinion on this point, and the whole family act in harmony together. But suppose the wife thinks she is not properly maintained, or the husband refuses to maintain her, or they have mutually separated; what is the rule of law in this case?

The general rule is, that the husband is bound to provide his wife with necessaries *suitable to her situation and his condition in life.*[1] If she contract debts for such necessaries, during cohabitation, he is obliged to pay for those debts; but for anything beyond necessaries, he is not liable.

There are two different cases in which the question of the husband's liability for the wife's debts may arise. The first is, when he is silent, and his assent is presumed. This is too common a case in actual life,—for whether a woman be living with her husband, or whether she be separated (except in the case of divorce, when she has ceased to be his wife), it is rare that the husband gives any public or formal notice, that he will not be liable for his wife's debts. In this case, then (when he has not directly refused his assent to the debt), the husband is always bound to provide his wife with necessaries, when she is not in fault, from a principle of duty and justice.

(259) The articles deemed *necessaries*, in law, are *food, clothing and medicine.* These, according to the principle stated above, must be suitable to her situation and his condition in life. Courts of justice have always

[1] 2 Kent's Comm. 146.

construed this principle fairly and liberally. A merchant or professional man, in good circumstances, cannot reduce his wife to the condition of the wife of a laboring man. His assent is presumed, in the first place, to her contracts; and whether he gives it or not, he is bound for necessaries proper for his and her condition in life. It may be taken for granted, that if a woman were to purchase things, on the credit of her husband, entirely inconsistent with their condition in life, and so obviously extravagant as that the suspicions of the seller ought to be excited, the husband would not be liable. But such cases in the United States, where all classes of people dress so nearly alike, and where all have good and substantial food, would be very difficult to prove. It must be an extreme case, which would take the husband out of the general rule of liability.

(260) The second class of cases is when the husband has given notice that *he will not be liable* for her debts. But the husband has not the power to deprive his wife of credit, on his account, for *necessaries*. The only effect of this refusal and notice is to oblige the tradesman, who sells the wife goods, to prove that they are necessary to her comfort, and not mere superfluities.[1] The husband, in this way, may be able to circumscribe his wife's credit within very moderate limits; but he cannot deprive her of credit for what is *necessary* in her condition of life.

On the other hand, if the husband were to make the wife a reasonable allowance, during his absence, and the tradesman had notice of this, the husband would

[1] 2 Kent's Comm. 146.

not be liable for further supplies, unless the tradesman could prove the allowance was not paid or was not reasonable.[1]

(261) So if the husband abandon his wife, or if they separate by mutual consent, or if he send her away, he is still liable: he sends credit with her.

On the other hand, if she be the guilty cause of that separation, as if she elope from her husband's house, he is not bound even for necessaries. He is bound to provide for her in his family; and while he is willing to do this, and is guilty of no cruelty, he is not bound for her elsewhere.

Money is not, in itself considered, a necessary; and consequently the husband is not liable for money lent to his wife, unless his consent can be shown. This rule, in our country, is rather an absurdity; for it often happens, that the things which are necessary, cannot be had without money.

(262) If the husband should refuse to provide necessaries for his wife, and prohibit one person or any person from trusting, and she is notwithstanding trusted with necessaries suitable to her condition in life, the husband will still be liable; for he cannot deprive her of the liberty, which the law gives, of providing necessaries, at his expense, for her own preservation.[2]

Again, if the wife receive such treatment as affords a reasonable cause for her to depart from his house, and refuse to cohabit with him; yet he will be bound to fulfil her contract for necessaries suitable to her circumstances and those of her husband.

[1] 2 Kent's Comm. 197.

[2] 2 Kent's Comm. 148.

SECTION VI.

WHAT RIGHTS OF PROPERTY THE WIFE ACQUIRES BY MARRIAGE.

(263) 1. The first right of property which she acquires is, that her husband must pay her debts; that is, her debts created before her marriage;[1] for of those after marriage we have already spoken. The meaning of the law is, that a man takes his wife and her debts together. He takes her property; and is therefore under moral as well as legal obligations to pay the debts she has contracted. In the United States, however, this is of little practical consequence; for women are married young, and very few indeed of them have any debts. Besides, as a general rule, women are much more careful of creating debts, than men.

(264) In addition to the rule above, there is this condition, that if the debts of the wife are not recovered of the husband during the marriage, they cannot be recovered at all. That is, if the husband survive the wife, her debts cannot be recovered of him after death. This is a mere rule of law, without much equity.

(265) 2. The second thing acquired by the wife is not so much an acquisition as an *exception* to the general rule which deprives her of all *control* over her property. This exception is, the control she has over the property secured to her under a *marriage settlement*. By virtue of the powers exercised by the courts of chancery, a woman may hold and control separate property,

[1] 2 Kent's Comm. 143.

1. By marriage settlements; and, 2. By gifts or bequests *in trust* to her separate use. (See Par. 250)· It is not unusual to convey property in this manner, directing the interest or income thereof to be paid to the wife, to her sole and separate use, free from the debts, control or interference of her husband, payable to her separate order or receipt, at and after the times that the payments respectively become due; and after her death, in trust for her issue.[1]

Such a provision as this, is, under our laws, often absolutely necessary to secure independence and comfort to the wife. There must be trustees; and then the woman acquires the sole control over the *use*, and has the power to appoint the purposes to which the income shall be applied.

In a court of chancery, she may act upon this trust property, and concerning it, as if she were a single woman. She may even institute a suit in equity, by her next friend, and may go still further and bring one against her husband, to obtain and control the property thus secured. The court will order him to pay money to carry on the suit.

(266) 3. There is a species of property acquired, or rather *retained* by the wife, called HER PARAPHERNALIA. What this is, and what rights she has in it, are very indefinitely defined by the law. By paraphernalia are understood *apparel*, *bedding* and *ornaments*. But her right to these is said to be only qualified. It is a right which she holds, not so much against her husband as against those who have claims upon her husband. For

[1] 2 Kent's Comm. 162.

example, the creditors of the husband cannot take her apparel, nor the ornaments, which have been given to her sole and separate use. If apparel and ornaments have really been given, by writing, to her "sole and separate use," she may retain them against both her husband and his creditors.[1] The intention of the donor, however, to give her a separate ownership, must be apparent. Such, for example, are jewels given to a bride, by her father, on the day of marriage. Bedding may be taken by creditors, but cannot be taken after his death. These articles all go to the widow, after the death of her husband, as her *paraphernalia.*

In most of the States there is a statutory provision expressly pointing out what articles shall constitute the paraphernalia of the widow. I will recite the provision of the statute law of Ohio,[2] as an example. They are these. It is provided that when a man dies, leaving a widow or a minor child, the following articles shall not be deemed *assets;* that is, shall not be taken for debts, and shall be left in possession of the widow and minor children, viz. 1. All spinning-wheels, weaving-looms and stoves put up for and used by the family. 2. The family Bible, family pictures, school books and other books to the value of fifty dollars, which had been a part of the deceased person's library. 3. A cow, twelve sheep, the wool shorn from them and the cloth manufactured by the family. 4. All wearing apparel, beds, bedstead and bedding, the necessary cooking utensils, and the following table furniture, viz. one table, six chairs, six knives and forks, six plates, six tea cups and saucers,

[1] Gould's Lectures.

[2] Statutes of Ohio, 1841, page 346.

one sugar-dish, one milk-pot, one tea-pot and twelve spoons. 5. The clothing of the family, the clothes and ornaments of the widow, and the wearing apparel of the deceased. If these articles are not in possession of the family, then the appraisers are to certify what sum in money is necessary to the support of the family.

This Ohio law of paraphernalia must, on a fair view, be deemed quite liberal. If it is not enough for very wealthy families, it is certainly quite correspondent to the means of the great majority of families, especially those in agricultural life. It is to be observed that these articles may be retained, whatever is their value; and hence where ornaments and furniture are of an expensive kind, even this allowance might amount to a large sum. I presume that the statute laws of most States make a similar allowance; and, at any rate, the common-law allowance of paraphernalia to the widow will be liberally construed by the courts.

(267) 4. Of the law of dower. The fourth, and in regard to real property the greatest, of the rights acquired by a wife in the possession of her husband, is what is commonly called the right of dower. This is the right which a wife acquires by the very act of marriage, in a certain portion of her husband's real estate, provided she survives him. This right is really acquired at the time of marriage, although the contingency on which it depends (the prior death of the husband) may never occur. In the ordinary course of human events, it happens that very large numbers of women actually do survive their husbands, and among

their husbands are also a large number who owned real estate. The consequence is, that to many women the law of dower becomes a very important part of the law. Where there has been (as is often the case) a valuable real estate in the hands of the husband, the dower-right may prove a competency to the widow, and even to the family. In all cases, where the husband had such real property, the dower is, at least, some aid to the widow.

(268) Dower takes place in an estate of *inheritance*, where the wife survives the husband. In that case she has, in that estate, a right which is called dower. It is the most frequent form of life estate, and that in which the holders of real estate are most interested.

The *right of dower* is defined to be the right which the surviving wife has in "*one third part of all the lands whereof the husband was seized, either in deed or in law, at any time during the marriage, and of which any issue she might have had might by possibility have been heir.*"

This is the old common law definition of dower, and it will be found, in most law books, in these words. This same definition is adopted in the statute of Ohio, in that of New York, and in a large majority of the States of the Union. But a very important departure from that rule has been made in some States. It is this. In the States of Vermont, Connecticut, Tennessee, North Carolina and Georgia, the wife is endowed only of those lands and tenements of which the husband *died seized.* The difference is very great. Under the common law prevailing in New York, Ohio, Virginia and other States,

if a husband had possessed houses and lands in his lifetime, and sold them (a very common case), the wife, at his death, would be endowed of them. But in Connecticut, Tennessee, etc., she would *not* be endowed of them; because her husband did not *die seized* of them. The practical difference is very great; for, under the common law rule of Ohio and New York, the wife cannot be deprived of her right of dower *without her own consent;* while by the rule of Connecticut, etc., the husband can deprive her of it when he pleases. So also, when the husband is an intemperate man or unfortunate in business, under the common law the wife might retain her right of dower; but, under the exceptions mentioned, she would lose it by the alienation of her husband's estate.

(269) The actual right of property in the husband's lands by virtue of dower, under the general rule given above, may be thus illustrated: What is the time when the right commences? When does it take effect? In what is the wife endowed? What is the nature of her interest? In what way can she bar her dower? 1. The wife's *right* of dower commences on the day of her marriage; but it does not take effect then, and it may never take effect; for her husband may never acquire real estate, and she may not survive him. But it is the *marriage* which is the elementary foundation of the right of dower. Her marriage gives her an inchoate or unperfected right of dower in all the lands which her husband possessed at the day of marriage, and all which he should acquire afterwards during marriage, and

of which right she cannot be deprived except by her own consent. Marriage we have elsewhere defined to be a civil contract (Par. 189), to which *no formalities whatever are required*, provided an actual contract can be proved between the parties. Hence no formalities of marriage are necessary to constitute the right of dower. A marriage *in fact* is sufficient, without any regard to age, license or other circumstances which are frequently required by statute.[1]

At common law we have seen an alien could not inherit, or take real estate; and hence an alien widow could not have a right of dower; but in New York, Ohio and most of the States, this rule has been done away by statute. Alien widows, in those States, can take a right of dower.

(270) 2. When does dower take effect? It takes effect in fact, at the instant of *the husband's death*. For example; in Connecticut and those States where the wife is endowed only of what the husband *dies* seized of, it is decided, that the husband cannot deprive his wife of dower, by will; because the dower right took effect before the will attached. It was prior in point of time. The dower estate of the wife, like that of the heir, is cast upon her by the very operation of law, at the death of husband, without any intermediate steps. When her husband dies, if he at any time during marriage had held lands, and she had not voluntarily parted with her right of dower, her right in them takes effect.

(271) 3. *In what is a wife endowed?* The lands

[1] 4 Kent's Comm. 36.

in which a wife is endowed are those of which a husband was *seized* (that is, *legally* possessed) at *some time* during their marriage.[1] This seizin, or legal right of the husband, must be one which is real, and beneficial to himself; and not one in which he was a mere trustee or conduit pipe for the benefit of others.[2] The estate the wife is endowed of, must not be a mere technical shadow, but a substance, a reality. For example, if the husband buy a piece of land, and at the same moment mortgage it back to the seller, the widow cannot claim dower as against the seller to whom the mortgage is made; for that would be manifestly unjust. But if, on the other hand, the premises thus mortgaged by the purchaser be sold to pay the mortgage, and there is a surplus after paying the debt, the widow is entitled to dower in this surplus money, as if it were real estate; for, this surplus is the exact property which her husband had in the land; he had no property in that part necessary to pay the mortgage.

(272) In the United States generally, a wife is entitled to dower in what is called the *equity of redemption.* That is, when her husband holds lands, on which there are incumbrances (such as a mortgage), he has a right to redeem them by paying off this mortgage. This right to pay off an incumbrance, and thus secure the surplus interest in the property, is called the equity of redemption, the right to redeem; and in this surplus interest, after the property has paid off the incumbrance, the wife has her right of dower, as in the case of a mortgage above stated. Even if the wife join with her

[1] 4 Kent's Comm. 37. [2] Idem. 43. 8 Ohio Reports, 412.

husband in the mortgage, and her husband should release his right to redeem to the holder of the mortgage, still she will be entitled to her right of dower in the lands after the mortgage is paid off; and, if the property is sold to pay the debt, to her dower in the surplus proceeds, if there be any.[1]

But the holder of the mortgage is not obliged to sell the land. After the land is forfeited by the condition of the mortgage, he has a right of entry on the land, and he may bring an action of ejectment and take possession. If he gets the land thus, or in any way by virtue of his mortgage title, then the widow is not entitled to dower; for, the equity of redemption is destroyed, and she has no right to dower, as against the rights of the mortgage holder.

(273) Dower must be in an estate of inheritance, but it is not material what kind of estate of inheritance. Thus a woman is endowed of all real hereditaments. She is endowed of rents; of the right of commons; of the right of way over lands; of the right to fisheries; of the right to mines which have been opened in her husband's life time. In fine, she is dowable of all those uses and benefits which flow out of, or belong to an inheritable estate in lands.[2] This is a consequence of her husband's legal inheritance in that estate.

(274) The estate in which she is endowed, however, must be in its nature an immediate freehold; and there must be an estate of inheritance, either in possession, in remainder, or reversion. Thus, if the life estate is in

[1] 4 Kent's Comm. 45.

[2] Idem. 41.

A, and the remainder in her husband, it must terminate by the death of A, and come into her husband's hands, or she has no right of dower.[1] But if a lease be made during the marriage, to A for life, and her husband die before A, still she will be endowed; because her claim of dower commenced before his lease.

(275) In some of the States, of which Ohio is one, the principle of dower, as to the property in which the wife is to be endowed, is extended much beyond what the strict letter of the common law definition would give. The statute of Ohio is very liberal, and I shall quote it here, as the most favorable example of dower in the United States.

The statute of Ohio thus defines dower:[2]

"The widow of any person dying, shall be endowed of one full and equal third part of all the lands, tenements, hereditaments and real estate of which her husband was seized, as an estate of inheritance, at any time during the coverture; and she shall, in like manner, be endowed of one third part of all the right, title or interest that her husband, at the time of his decease, had in any lands and tenements held by bond, article, lease or other evidence of claim; and she shall remain in the mansion house of her husband, free of charge, for one year after his death, if her dower be not sooner assigned her."

Here, it will be observed, the wife is endowed not merely of lands to which the husband had a *title;* that is, of which, in the language of the law, he was *seized;*

[1] 4 Kent's Comm. 37. [2] Statutes of Ohio, Art. Dower.

but she is endowed of one third part of *any interest* of whatever kind, held by him in lands. She is endowed of a lease, and she is endowed of any right which he had at the time of his death, by *contract* for any land. This law is far more liberal than the common law. Dower extends in Ohio, and it is presumed in most of the States, to wild lands as well as those which are cultivated. In Maine, New Hampshire and Massachusetts, however, a widow is not endowed of wild lands, on the old feudal principle, that a tenant for life cannot commit *waste*, that is, destroy timber, and therefore a widow can have no use for such lands. In Ohio and other States, where she is endowable of wild lands, it is presumed she would be allowed to clear the timber and cultivate the lands as far as she could; especially as, in most of the States, cultivated lands are more valuable than those which are in woods.

(276) 4. *What is the nature of dower interest?* It would be a sufficient reply to this question to say that a widow's right in real estate of which she is endowed, is the same as that which attaches to any life estate. It is a life estate. It is better, however, to define this, by stating the most important things which a widow may or may not do. 1. If a widow be endowed of house in town or country, she may either occupy it herself or rent it for income as the owner in fee simple would. But she is bound to pay the taxes and the necessary repairs; that is, those charges which are annual, and belong to the wear and tear, in use, of the house. 2. If she is endowed of an arable farm, she may rent or use

it, under the conditions above mentioned. She may also take what the feudal law calls *estovers;* that is, she may take wood enough for *fires*, for *fences*, for agricultural *utensils*, and for all necessary buildings; but she is not allowed wantonly to destroy the timber. It is presumed also that she is bound to take such ordinary care of the land as will not injure it permanently. 3. If she be endowed of wild land, as we have said, in Ohio and many other States, it is to be presumed that she is entitled to reduce that land to cultivation, by the ordinary methods,[1] notwithstanding she would thus destroy timber not comprehended under the heads aforementioned. Arable land, in a new country, is more valuable than wild land; and she would not, therefore, be committing what is called *waste;* but, on the contrary, would be enhancing, for the heirs, the value of the land. 4. If she die before the annual crop is gathered, *her* heirs or representatives are entitled to this annual crop, which is called *emblements*.[2] These are those crops, such as grain, potatoes, etc., which owe their existence to the annual labor and cultivation of man; but do not comprehend a natural crop, such as grass, fruits, etc. The reason of this is obvious: whatever labor the tenant for life may have put on the estate, she should be entitled to, either by herself or representatives. Her labor shall not be thrown away. 5. If the tenant for life make an under-lease, she has a right to do so; but the under-lease will terminate on the termination of the life estate. In that case, the representatives of the life estate (on the death of the widow or other holder) will, if the an-

[1] 4 Kent's Comm. 75. [2] Idem. 73.

nual crops be not gathered, be entitled to receive the rent of the under-tenant for the unfinished year, and the tenant will be entitled to the growing crop, the *emblements.*[1] 6. If the estate for life be taken subject to an incumbrance (as, for example, a mortgage), the life tenant is bound to keep down the interest of the incumbrance out of the rents, issues and profits; but is not bound to pay off the incumbrance. In the case of dower, however, it is decided the widow is only bound to pay *one third* of the interest on the incumbrance; because that is the proportion of the estate she received. 7. The tenant by right of dower is, in general, subject to the same penalty for *waste,* as any other tenant for life. In Ohio this is made so, expressly, by statute.[2] This declares that the tenant in dower shall forfeit that part of the estate on which waste was committed. Waste causes forfeiture also in New York, Virginia, and probably all the States. What is waste? Waste is any destruction of property, or other changes which are of permanent mischief to the estate. Thus, pulling down houses, suffering them to go to decay for want of ordinary care, cutting down timber unnecessarily, or changing the cultivation of land so as to injure the soil, are acts of waste. In other words, whatever does permanent injury to the estate is waste. The consequence of such acts is that the heir, or whoever holds the estate of inheritance, has a right to a suit of waste; by which, if the facts are proved, the tenant for life would forfeit that portion of the estate.

[1] 4 Kent's Comm. 73.

[2] Ohio Statutes, 1841.

How Dower Right is defeated or barred.

(277) 5. *In what way is dower defeated or barred?*

Dower, we have already said, is an inchoate right, which commences at the marriage, attaches to the land, when the husband is possessed, but is not perfected till the husband is dead. This right, the husband alone cannot defeat in any way. But there are various ways in which the acts of the wife, or acts with her concurrence, will defeat or bar the estate.

1. *The voluntary act of the wife* in conveying *by deed*, the property in conjunction with her husband, as in any other conveyance of property, will defeat her right of dower. But this act must be *voluntary*. In order to ascertain and make clear, that it is voluntary, the laws of some of the States[1] provide, that the wife shall be examined *separate and apart* by the officer who takes the acknowledgment of the deed, and that this fact shall be stated in the certificate of the officer.

Wherever there are provisions of statute law regulating the manner in which wives shall execute deeds, those provisions must be carried out, literally and strictly, or the conveyance will not be deemed valid. Courts of law look upon the right of dower with favor, and if a question arises, whether a woman has conveyed away the right of dower by deed, the courts construe doubtful cases in favor of the woman.

2. Dower may be defeated, by all incumbrances or claims, as we have already said, which are *prior* to the commencement of the dower claim. Such, for example, as a mortgage. For these are good against the es-

[1] Statutes of Ohio, 1841.

tate, and they are prior to the right of dower. So also if the wife joins the husband in making a mortgage, she is bound by it, and the holder of the mortgage is preferred to her.[1]

So if the husband had *contracted* to convey lands before marriage but had not actually conveyed them, the wife is not entitled to dower in those lands, because in equity, *that is considered as done, which ought to be done.* If there has been a contract about lands or money, they are considered in equity, as converted into that species of property, into which they were agreed to be converted.[2]

3. Dower may be barred, by the conveyance of another estate to a woman in *lieu of dower.* Thus, if an estate be conveyed to a woman, as a jointure, in lieu of her dower, to take effect after the death of her husband and to continue during her life, such a conveyance bars her right of dower to the lands which were her husband's; but if she was not of legal age or it was made after she was married, she has a right to make her choice, whether she will take her jointure, or demand dower.[3] She would of course, in such case, choose that which was most valuable.

If, however, there should be a defect in the conveyance of jointure, and the wife should, in consequence, demand dower, she will have dower, but cannot have the jointure also. She must take one. She cannot have both. So also, if she be evicted, that is, turned

[1] 9 Ohio Reports, 15. [2] 4 Kent's Comm. 50. 1 Ohio Rep. 538.

[3] Statutes of Ohio, 1841. This is copied from the Ohio law; but the general principle is the same in all the States.

out from the lands given her as jointure, she is entitled to be endowed of as much of the lands and tenements of her husband which remain, as her jointure amounted to.

This principle of barring dower by a jointure, was introduced into the English law in the time of Henry VIII, and was copied into the N. York statutes and subsequently into those of other States.

Dower will, it is said, be also barred, by giving the wife, by will, money or other chattel interests. This does not appear to be the case in Ohio, and probably does not pervade all the States.

The principle of jointure, in barring dower, is very obvious. The law goes on the idea, that the settlement of jointure is made purposely by the friends of the wife, *in lieu* of dower, and it also assumes that it is sufficient; for when the woman has not legally assented to it, as when she was under legal age, or when it was made after marriage, the law gives her the choice between the dower and the jointure. In one word, it supposes that a sufficient provision has been made for her, and made with her own consent.

4. *Elopement and living in adultery*, also bars dower by the English statute, by the Connecticut and Ohio Statutes,[1] and this is probably the general principle. If however, the wife returns and a reconciliation with the husband takes place, the right of dower is restored.

5. So also, *a divorce* bars the claim to dower. But if the husband and not the wife is the *faulty cause*, the

[1] Statutes of Ohio, 1841.

wife is entitled to alimony instead of dower; for it would be hard indeed, if the wife were to lose her rights by the evil acts of her husband.

(278) Dower is *set off* after the husband's death by the heirs or holders of the inheritance, provided there are no incumbrances, and provided also, the widow is agreed; but otherwise, she may proceed by petition in chancery, setting forth what lands her husband held, and her claim to them. This will be considered by the court, and dower set off by the sheriff, according to the decree. By the common law, she is entitled to remain in the mansion-house of her husband. In Ohio, she is entitled to remain one year. In all respects, the great principle of the widow's right of dower is fully and liberally carried out; but in no State more so than in Ohio.

The Affinities of Marriage.

(279) By the Hebrew law, as stated in the introduction to this treatise, marriage created not merely an intimate relationship between husband and wife, but also certain *affinities*, between each of the parties to the marriage union, and the relatives of each reciprocally. On this principle, certain acts which were not criminal with others, were made criminal with these relatives by affinity.[1]

The greatest care was taken in the Hebrew law, that the purity of families should be preserved.

(280) This principle is also a principle of the Chris-

[1] Leviticus, 17: 17.

tian system, and is carried out, in a great measure, in the English and American law. The crime of incest, for example, is defined to exist not only between natural relatives, but between step-fathers and step-daughters, step-mothers and step-sons. These are affinities created only by marriage, and this special crime, in this case, could only exist by virtue of affinity. It is made such, in consequence of the *nearness* of such connections, and the rule is founded on correct views of human nature.

(281) In the definition of incest, given in the Ohio statutes, this crime is defined, as arising from the connection of step-father and step-daughter; step-mother and step-son, although from the simple reading of the statute on marriage, it would seem, that marriage between these relations would hardly be forbidden, at least *by the words;* for the statute forbids marriage between those nearer of kin than first cousins. Now a *step*-father and a *step*-daughter are not of kin, by blood. It is the nearness of the connection, *by affinity*, as criminal law, which makes the bar.

SECTION VIII.

(282) We come now to consider some of the *chief differences between the rights of a wife and those of a husband.* These are obvious from a review of what has already been said, upon the law of this relation. They relate almost entirely to three things. 1. Personal control. 2. Rights of property; and 3. To rights

of dower. The preceding rules of law, have already shown what these are.

(283) 1. *Of personal control.* It is seen, that in marriage, the *legal control* of the wife passes to the husband, not that of the husband to the wife. For example, (Par. 228) the husband has a right to the services of his wife; he has a right to reclaim her when absent; he has a right to use gentle means of restraint; and for these purposes, he has the right to claim aid from the law and its officers. In one word, in the theory of the law, the *custody* of the wife belongs to the husband. Here is the first striking difference between the condition of a woman in a married state and that of her husband. She has no such custody over him. This principle is evidently derived from the Scripture rule, that the husband is head of the family. But one idea deserves at least a suggestion. If the society and services of a wife are, as they ought to be, so valuable to the husband, are not the society and services of the husband equally so to the wife? If the husband has a right to use gentle restraint upon the wife in case of *evil habits*, ought not the wife to have a right to demand of the law, that it should also restrain him from evil courses? For example, if the husband wastes his substance in drunkenness, and his time in idleness, has not the wife a right to demand of the *law* that it should restrain him, in the manner which he can do her, by the control of her property and person?

A singular case is reported in the newspapers, as having occurred in Connecticut, which if correctly re-

ported, shows that some of the rigidity of the old law, on the subject of custody is weakened. It arises out of this question: Can a man *abduct his own wife?* This case would seem to decide that he could not. And yet most certainly, if his power of custody over her, is as strong as it is laid down in the old authorities, he could.[1]

A, the wife of B, in Connecticut, left her husband and lived with her father, or uncle, at all events her near kin. B, by the aid of some persons, seized her, carried her through N. York to Virginia, whence she was taken back, either by pursuers, or by his consent. In an action for damages, subsequently, it was decided that this *abduction* of his wife was illegal. If this is to be the law on this subject, then the old law may be considered as completely revolutionized. This is also the tendency of opinions, at this day.

(284) 2. The second great difference in the condition of men and women, in the marriage state, is in relation to the *rights of property.* Here we have seen, (Section 5) that the husband, at marriage, acquires during his life, the *entire and exclusive use of the wife's real estate.* Of her personal property (money, jewels, furniture, etc.), he acquires the absolute and *entire right.* If the sum she brought were ever so large, he might dispose of it all instantly. So if she has rights of property *in action,* he may acquire for himself the whole, and dispose of the whole. *She,* on the other hand, acquires no such rights in her property.

[1] 1 Blackst. 445.

The only real protection she has is, in the fee-simple of real estate, of which she cannot be deprived except by her own act. These differences in rights of property are very great, and we point them out, not to suggest amendments, but to show the fact.

(285) 3. The next great difference consists in the rights which either derives from the other after death. The wife's right to the husband's real estate after death is the right of dower, and this we have seen (Section 7), is a right to the use for life, of one *third* the husband's real estate. Now on the death of the wife the husband has an estate for life, in the *whole* of the wife's lands and tenements. That is, the husband has just three times as great an interest after the death of his wife, in her lands, that she has, after his death, in his lands. If he owned three houses of equal value in N. York, on his death, she has a right of dower in *one* of them. If she has three such houses and die, he has an estate by the courtesy in the whole of them. In the personal property, the difference is as great. He takes the whole. She takes a certain portion at his death, according to the statute.

(286) 4. There is one difference which does *not* exist in the theory of the law and of Scripture. There is *no sex in criminal law*, because there can be no sex *in morals*. It is true, that the old feudal law did make a distinction, even here;[1] for it could never get over the idea, that because women were incapable of military service, *therefore* they were inferior to men. But

[1] Christian's Blackst. Vol. I. 445, note.

our American criminal law makes no such unreasonable distinctions. Murder, theft, adultery, etc., are the same *crimes* in women, as in men. It is true, that the public opinion of men does require a stricter observance of certain morals in women, than in men; but in this age of the world, they have not dared to carry that idea into the criminal code. They have, at least, made the *law* conform to the equity of morals.

SECTION IX.

(287) We must now revert, for a moment, to the *ameliorations produced in the English law*, in regard to women, by the republican codes of the United States.

1. In England, as we have seen in the canons of inheritance, the whole landed estate, with the exception of small districts (where a *local* law prevailed), went to the eldest son. This worked two species of injustice. First, it disinherited the *female children;* and next it disinherited the younger children, both female and male. This was a feudal rule, and unquestionably the effect is to make a family estate, and family name more stable. But this benefit was more than compensated, by the difficulties of keeping up their station, and modes of life, by their younger children. This rule is, in the United States, everywhere abolished. If its abolition has been useful, there can be no doubt that a large part of that utility has ensued to women, who either as heirs themselves, or as the wives of younger sons, would share equally with men, in the benefits derived from the equal diffusion of property.

(288) 2. A second, and probably the greatest amelioration of American jurisprudence, is the *relaxation of the old English rules*, in regard to the husband's control over the wife. The student, when he reads American laws, especially the most modern, will see, as in the example of custody given above, that the rigor of the English rules is continually relaxed in favor of women. The free spirit which pervades the whole legal and social structure of the United States, has entered this branch of jurisprudence also. The spirit of the age tends the same way, and the courtesy of the American people inclines them towards the same end.

In some of the States, projects of laws have been already introduced into legislatures, securing to women the exclusive right to their own property. Whether in the end, this would be really advantageous to the whole people, nothing but time and trial can determine. In the mean time, we may here remark, that this principle already exists in the civil law which prevails in a large part of Europe, and in the State of Louisiana. It does not appear that property has been more unstable in these States, or that women have, by that means, acquired any very extraordinary independence. On the contrary, it would seem that the relations of men to women have remained nearly the same; but it is probable that families have been easier secured against the downfalls of life. At least, such ought to be the effect of a law, which vests a certain amount of property in the wife.

CHAPTER V.

THE LAW OF PARENT AND CHILD.

SECTION I.

(289) The *relation* of parent and child, like that of husband and wife, is founded in the laws of nature and religion. It commenced with the first pair, and will be as lasting as the human race on earth. To this relation all the three classes of laws (viz. those of nature, revelation and civil society) apply with full force. So close are the ties of natural affection towards offspring, that if there were no other laws than those of nature, the majority of mankind would unquestionably perform all the duties which that relation requires. In fact, in some persons, especially mothers, this affection amounts to an absolute and unconquerable devotion. Notwithstanding this fact, however, there have been many melancholy examples to the contrary. *Infanticide*, we have seen, has often been committed even in Christian countries; and in heathen nations it has been one of the strong and frequent proofs that the dark places of the earth are the habitations of cruelty. So, on the other hand, though most children venerate their parents, it is still true, that savage nations often treat the aged as incumbrances; and instances are often found, in civilized lands, of most barbarous and cruel treatment of children towards their parents. This fact makes the necessity

for other laws. The divine law, therefore, is most explicit in its injunctions and commands.[1] St. Paul describes those who are without natural affection, as those who are given over to a reprobate mind;[2] and commands children to obey their parents. What the natural law has founded and the revealed law confirmed, the law of civil society also enforces. It follows the relation of parent and child, from the first moment of being, through all the duties of life; and prescribes rules by which these duties, so far as society can take knowledge of them, shall be performed. In making a brief outline of these rules, I shall consider the subject in the following order, viz.

1. When does being, *in law*, commence?
2. What is legitimacy and illegitimacy?
3. What is the power of parents over children?
4. What are the disabilities of non-age?
5. What are the duties of parents to children?
6. Where does the right of custody rest?
7. Duties of children to their parents.
8. Rights of society over orphans.

These subjects, the reader perceives, are of vast importance. Let us examine them in their order.

SECTION II.

(290) 1. When does human being, *in law*, commence? An *unborn child, in ventre sa mere* (in its mother's womb) is, for many purposes, regarded in law

[1] Exod. 20th ch. 5th commandment. [2] Rom. 1: 31.

as born.[1] This we see most clearly recognized in the criminal law, by the statute laws against *voluntary abortion.* (See Art. 32.) *When* this supposed life commences is not exactly known; nor is it necessary, to the rules of law, that it should be precisely ascertained. It is a question properly belonging to medical jurisprudence, and is very fully discussed in the work of Dr. Guy, edited by Dr. Lee.[2]

But the law recognizes, in many of its rules, the important fact, that *life* really begins before birth. If it did not, what a deep wrong would be worked towards posthumous children! So also where rights (as those of inheritance or devise, for example) must take effect at a given moment, and yet the being in whom they are to have effect is not yet born, it is necessary that the law should go *behind the actual birth,* and recognize that there was such a being to take the inheritance or the devise. Several examples of this may be given.

If, in a marriage settlement, provision is made for children living at the death of their father, an unborn child will take the property.[3] So, the birth of a child, by the law of wills, revokes a will made before the birth of that child; and the birth of a posthumous child will operate as such revocation. By the Stat. 12 Charles II, an unborn child may have a guardian assigned it. That is, the father may, by will, appoint a guardian for his children; and the unborn child is considered as one,

[1] 1 Blackstone, 130.

[2] Guy's Medical Jurisprudence, Harper's edition, 198.

[3] 1 Blackstone, 130.

and when born is under the guardianship of that guardian.

So if a father leaves his child executor, and the child is a posthumous one, he is the executor; but cannot act till he is of age. If a legacy is left to the unborn son of John Tompkins, and *two* are born, they will take the legacy jointly, neither having preference over the other.[1]

Thus we see that, for many important purposes, a child is in *legal being* in its mother's womb. The evidence that it was in being is indeed perfected by the *subsequent birth;* but when that has taken place, the law will give effect to its *rights*, acquired at a prior time.

(291) 2. The next question is,—among children, what determines their *legitimacy or illegitimacy?* Legitimacy, as related to birth, attaches to those who are children *legally.*

There are two principal things required to make a child legitimate. 1. That the parents should be *married prior to its birth.* 2. That the child should be born either *in wedlock, or within such a period afterwards as to make it naturally possible* to have been the child of the husband of its mother.[2] These are the only requisites to legitimacy. It is *not* requisite, provided these conditions are complied with, that the child should be either begotten or born in wedlock. For example, suppose that Keziah Wellington and James Small marry on the 30th of October. On the 10th of November Small dies; and on the 20th of December

[1] Gould's Lectures, Parent and Child. [2] Idem.

Keziah has a living child. It is evident here, that this child was neither begotten nor born in wedlock; yet *it is a legitimate child;* because its parents were married before its birth, and it was born within a natural period after the husband's death.[1] Here it will be observed, that the first requisite is marriage. The question of legitimacy, therefore, requires proof of a marriage. What constitutes a marriage, we have already fully discussed. It follows, from the necessity of marriage to legitimacy, that if a marriage be *absolutely void*, as is the case under some circumstances (Art. 177), then the children born after such marriage are illegitimate. But we have already observed, under the head of marriage and divorce, that the best and the most common mode of treating such marriages, is to consider them as valid, and then obtain a divorce. By statute, the children born or begotten before divorce are legitimate. The *second fact* necessary to make a child legitimate is, that it should be born within the natural period after the death of the husband of its mother. What the natural period of *gestation* is, may be known by consulting Guy's Medical Jurisprudence. Within that period, the child is presumed legitimate; beyond it, it is presumed illegitimate. This, however, is only a *presumption* of law. The law allows such facts to be proved as will go to satisfy a jury that there was or was not a probability that the child or person in question was legitimate.

(292) From the above statements we see that an *illegitimate child* is one not born in wedlock nor within such a limit of time afterwards, as would make it possible

[1] Gould's Lectures, Parent and Child.

that he should have been begotten in wedlock. By the common law, if such a child were born, and the parents were to intermarry afterwards, that would not legitimate the child. By the laws of some of the United States, a more humane and reasonable rule is adopted. If the parents choose to become man and wife, by the statutes of some States their former delinquencies are covered, and they make their children legitimate by the subsequent marriage. By the statutes of Ohio,[1] where a man has by a woman one or more children, and he subsequently intermarries with that woman, such children, if he acknowledge them, are made legitimate. Not only so, but the issue of marriages deemed null in law, shall nevertheless be legitimate.

(293) If however a child is born illegitimate, and those States where a subsequent marriage of the parents would legitimate him, no such intermarriage has taken place, the child is what is commonly called a *bastard.* Here, what are the relations of such a person to his parents and the community? The consanguinity or relationship of a bastard can only be with his posterity, except his mother; for kindred must be traced through a common ancestor, and a bastard has none. In respect to successions and inheritances, he is said to be the *son of nobody* or the *son of the people.* A bastard cannot, according to the English law, be *heir* of any one, nor can he have heirs, except of his own body; for no one can trace a common blood with him.[2] Notwithstanding this theory, the law recognizes *the fact*

[1] Revised Statutes of Ohio, 1841, p. 288. [2] 1 Blackstone, 459.

that a bastard *may* have blood relatives; for it prohibits him from marrying any one within the degree of first cousin; for such a union would be *incest.* In fact, the mother of a bastard may have several children, whether legitimate or not; and the bastard may not marry one of them; for it would be incest. The rule applies only to the law of inheritance and succession. But even here, the modern law has moderated the severity of the rule. The humane law of Ohio says, that a bastard may inherit the estate of the mother, and may transmit inheritances from her.[1]

A bastard acquires a *sur-name* by *reputation;* and this fact, connected with the institution of foundling hospitals, is probably the real reason why so many singular and very unaccountable names are continually arising in society.

(294) The *settlement* of a bastard is in the town where born. This term settlement means that right to *maintenance* which a pauper or infant acquires against the public. As this duty of maintaining the poor and helpless belongs to the townships, the right to it must attach to the pauper *as against some particular township.* Hence a bastard has a settlement in the town where he is born. The *maintenance* of a bastard can, by the laws of most of the States, be enforced against him who is called, in law, the *putative* father. That is, if the mother charges some individual with being the

[1] Revised Statutes of Ohio, 288. —— In Vermont, Connecticut, Virginia, Kentucky, Indiana, Missouri, Illinois, Tennessee, North Carolina and Georgia, bastards may inherit from their mother.

father of the child, and in the manner pointed out by the law proves it, this putative father can be bound over and obliged to give security for the maintenance of the child. This is an order of court for *filiation* or maintenance.

SECTION III.

(295) The next inquiry is, what is the *power of the parent over the child?* This involves another question, *by whom* is the power and government over children to be exercised? Unquestionably, by the laws of nature, religion and society, *by both parents jointly.* That is to say, any act which, by the law, a parent may exercise over a child, that act will not have its validity impaired by the fact that it was performed by the *mother.* This observation has an exception, of course, in certain legal suits for redress for wrongs done to the child; for, as the power of bringing legal actions for the wife herself is in the husband, so also is that of bringing suits for the child vested in the father. For an infant or minor can appear in court only by guardian or next of kin, and the father is both guardian and next of kin. We mean that any act of correction, restraint or government which is justifiable towards the child, is justifiable by the mother as well as the father. During the lives of both father and mother, and while they are sane and undivorced, the right of personal government and care vests in both. The law does not step in to say what precise share shall be exercised by either parent; and in the practice of mankind nothing varies more.

The government of children is, in fact, exercised by both, at will or convenience, from one extreme of the scale to the other.

If the husband die, the whole power and duty over and towards children vests in the mother. This is a case which often occurs, and is precisely that one which tries the capacities and powers of women more than any other in which they can be placed. In almost every other relation of life, they can depend upon and look to some other person. But the woman who is at once widow and mother, has no dependence upon any one but herself for the performance of the most important duties of both men and women. In the various parts of this book will be found most of the principles of law and business, which should govern a woman so placed.

(296) What is the *power which a parent may exercise over the child?* The power of *correction in a reasonable manner*, by punishment, lies in the parent.[1] This right, however, stops at the limits of inhumanity; for the law will not suffer cruelty, even in a parent. If a father or mother were to inflict punishments on a child in such a manner as to endanger life or limb, he could be restrained by law; for in this case the rights of the *citizen* in the child will prevail over that of the parent in the father.

(297) This power of the father to correct the child, may be delegated to a tutor or master. In this case, the master is *in loco parentis* (the place of the parent), and may do as the father might have done.[2]

The father also may bind his child, either male or

[1] 1 Blackst. 452. [2] Idem. 453.

female, as *an apprentice.* This is a more important business than a mere permission to correct the child. The father if living, or if dead, the mother may deed, convey, by an instrument of writing properly authenticated, the services of the child, for a certain number of years, or till it comes of age. This is usually for the purpose of having the child instructed in some trade or profession. By this instrument the power of the parent over the child is, for all common and reasonable purposes, conveyed away to the master.

(298) The *consent* of the parent is required to the marriage of a child under legal age. But from the fact we have already stated, that the marriage, when once solemnized, *is valid*, the withholding this consent is a nullity, so far as it affects the marriage. The parent has, however, the power to withhold it, and by withholding it can cause the punishment of those who perform the ceremony for the parties.

(299) In regard to *property*, the father or mother has no power over an estate belonging to a minor child, except as the guardian or trustee of the child, and for the management of which he must account. The rights of a minor daughter, for example, are, in regard to her estate, absolutely sacred; but her father is her proper guardian and trustee till she becomes of age.

So too, a minor daughter is entitled to all the property she *acquires*, not by labor or service. If she has money and buys land, it is hers. If she has property given to her, it is hers.

(300) But the *services* of a minor child belong to

the parent. Legally they belong to the father. In contemplation of law, a daughter, for example, is the *servant* of the father; and therefore he is entitled to the wages of the daughter. This is one of the lamest parts of the English and American law. Theoretically it is barbarian, although in practical working, judges and juries make it work very nearly correct. For example, if John Blackwood's daughter Mary is beaten and injured by Peter Robber, Blackwood cannot sue directly for a trespass on his daughter; but he must sue indirectly for the loss of her services, as his servant! This is sinking the laws and rights of nature into a mere legal quibble. When, however, the jury come to render a verdict, they take all the circumstances into view, and render the damages as if the father had sued directly for the insult and injury to the daughter.

Law of Seduction.

(301) The legal fiction that the child is the *servant* of the father (strange as it may seem), has heretofore been the only foundation of any right on the part of a father for a remedy or for damages for the *seduction* of his daughter! This is one of the strongest evidences of the veneration with which even the cobwebs of the law are regarded by the legal profession. No man justifies such an absurdity; yet it has remained, for ages, one of the venerable relics of ancient barbarism, untouched by the hand of innovation, which touches and destroys so many better and nobler things.

If then John Cartman's daughter be seduced by Pe-

ter Blackguard, his only remedy will be a suit for damages, alleging that Blackguard has destroyed the *services* of his daughter Caroline! Under this allegation, he may prove the aggravating circumstances, whatever they were, attending the seduction, and the jury will give damages according to the real nature of the transaction.

But here arises the question, Is this the true and just mode of treating the *crime of seduction?* For it must be observed, that seduction is not merely a licentious intercourse. It is licentious intercourse attended *by a fraud* of aggravated nature. It is, therefore, in its very definition, *a crime.* Why then is it not treated as a *crime,* and punished accordingly? It might be said, that such a law would not produce the effect intended. We are very sure it would, so far as any criminal law produces an effect. In the early Roman history, the *parent* had the power of life and death over his children, and frequently exercised it. This was legalizing infanticide or the killing of youth by the parents. When a milder and more refined state of society was introduced, this law grew into disuse; but some persons still exercised its power. Then it was repealed and the power declared unlawful. This was not enough. Such act of the father was made a *crime,* and placed on the level of similar crimes. Then the practice ceased at once. The criminal law prevailed.[1] Such would be the case with seduction, except in those rare instances which make the exceptions to all general rules. This subject has been agitated in some of the

[1] 2 Kent's Comm. 204.

State legislatures; and one or two, we believe, have passed laws on the subject.

As we have said, the father can bring an action against the offender for seduction. In this action the daughter is a good witness; and the jury will give damages not merely for loss of service, but for the damages to her reputation and the injury to the feelings of her friends.

(302) The power of the parent over children ceases at what is called *majority* or legal age. By the common law of England, and by that of most of the States, legal age is *twenty-one*. But in Ohio, Vermont, and perhaps other States, *females* are of age at *eighteen*.[1] At *legal age*, children are bound by their own contracts, can manage their own property, and cannot be restrained.

(303) We have said that, in the government of children, the parents had joint authority, so far as that the acts of the mother, in any reasonable restraint or punishment, would be legal. The *law*, however, theoretically says that this government is wholly in the father! This is only theory. If any such case should ever come before the courts, the more reasonable and civilized principles of the modern law would, no doubt, decide the case as we have stated it.

SECTION IV.

(304) The next question is, What are the disabilities of NON-AGE? This involves a good deal of techni-

[1] 2 Kent's Comm. 231. Ohio Revised Statutes.

cal law, which concerns only lawyers in the management of suits. All the *principles* concerning the law of non-age we shall here state, so that any one can understand them. All persons who are *under* legal age are called INFANTS, no matter what their real age or strength may be. They are called infants because incapable of performing *legal acts*. This incapacity gives them some privileges and creates some disabilities which do not attach to persons legally responsible.

(305) 1. Of political privileges it may be stated generally that, in regard to *women*, there is no legal age and no disabilities; for the rights of a woman, politically, are the rights of a *citizen;* that is, they are those rights which she enjoys by virtue of being a member of the political community, and in which that community is bound to guaranty her, either as against foreign communities, or as against the individuals in this community. These are rights of citizenship, which are not measured by age.

(306) 2. As to *crimes*, a person of non-age cannot be punished for any offence whatever, criminally.[1] The presumption of law is, that they are of too few years to have had malignant intentions, or to be informed in the law. They are said to have *no will*.

At *fourteen*, such a person may be punished even capitally. Between seven and fourteen, the question of a liability to punishment criminally depends on whether the infant could discern between good and evil, or had sufficient understanding to be aware of the nature of the crime and its consequences. It lies upon

[1] 1 Blackst. 465.

the State to prove this fact; and if it does not, the infant will not be liable. In modern days, when the criminal jurisprudence has become so mild, no punishments are inflicted upon persons younger than fourteen; though a large portion of criminals are in early life.

(307) 3. For wrongs committed *forcibly*, a person of non-age is liable. It is said, that even idiots, or lunatics are liable. Here the suit or liability is not part of the criminal law; and hence the question is not whether they are *guilty* in mind, but whether their property can be made to answer for their wrongs or trespasses.

(308) It is a general rule of law, that *no person under twenty-one years* of age can bind himself or herself by *any contract*.[1] As a general rule this is true; but there are exceptions to it, which we shall point out. This rule works sometimes unequally. Thus, if Mary Simpson, who is under age, join in a contract with her sister Caroline, who is of age, to pay certain monies to John Tompkins, Caroline will be bound by that contract, and Mary will not be; because she is under age. That is, if a minor and an adult join in making a contract together, the adult will be liable for that contract; but *the minor will not be*. So, if Mary Simpson has made a contract with John Tompkins to do some act on the payment of a sum of money, John Tompkins is liable to Mary for his part, but she is not liable to him. So an infant cannot sell or alien his estate by any contract of his.

(309) To this general rule, there is a general excep-

[1] 1 Blackst. 466.

tion. It is this: that a person of non-age may bind herself for what are called *necessaries*. The reason of this rule is obvious. If Mary Simpson, for example, were placed in a strange town at school, and she is suddenly deprived of her parents or guardians, and being under age could make no binding contracts, such as strangers would be willing to trust, she might starve, go naked, or lose her education. That she should be able to contract for the *necessaries* of life, and thus procure credit, is, therefore, a matter of necessity. But in order to make the rule of exception *applicable*, it must be seasonably applied. Thus, Mary will not be allowed to make this contract for necessaries binding upon herself, when she is already provided for by her parent or guardian. Her right to make the contract binding on herself, is only *co-extensive with the necessity*. She cannot even make a contract for necessaries except 1. When she has no parent, guardian, or master. 2. When she is out of their reach and care; or 3. When she is not duly supplied with necessaries, and is likely to suffer for want of them. In these latter cases, the parents or guardians are likewise bound by the contract; for they are bound to supply the infant with *necessaries*. What are necessaries? They are defined to be *food, apparel, lodging, medical assistance, and instruction*. Proper instruction is certainly one of the necessaries of civilized life, and the word here includes a knowledge of *a trade*, as well as the common scholastic knowledge.

(310) We have already said, that the *marriage* of

infants is valid even without the parents' consent, provided they were of the *age of consent*, which by the English rule is *fourteen* in males, and *twelve* in females. As a male over fourteen and under twenty-one may make a valid marriage, and yet is of *non-age*, it follows, that he may bind himself in a contract *for his wife and children.* On the same principle, he is bound for his wife's debts contracted before marriage; for he takes her and her circumstances together.

In paying for necessaries contracted for, a person of non-age is bound to pay only the *exact value.* That is, an infant is not even bound by his contract, when the sum charged for necessaries is extravagant.

(311) A person of non-age is not bound for *money lent* to him, unless he uses it for necessaries, and then he is bound to the extent of the necessaries, and no more. The reason of this is, that *money* is not of itself a necessary article.

If such a person marry, and rent a house, he is liable for the rent, on the principle that the house is *lodging* for his family.

So, if a person of non-age was the owner of a mortgage debt, and the debtor was to pay the mortgage, *the release and receipt* of the infant is valid; because this is a matter of necessity; he might have been compelled in equity to give such release.

(312) The plea of infancy is not allowed to protect *fraudulent* acts.[1] He cannot receive rents, and then when he comes of age demand them over again. So

[1] 2 Kent's Comm. 242.

if a young man or woman, not of age, represent themselves of age, and thus buy goods on false pretences, the seller is entitled to reclaim the goods, as having never parted with them.

(313) A person of non-age may bind himself, or herself as an apprentice, and when bound cannot dissolve the relation; because this power is manifestly for such person's advantage.[1]

A person of non-age who is a mere trustee, without having any interest, may execute the trust under an order of court, whether by deed or otherwise. Whatever, in a word, a person of non-age is bound, *by law*, to do, —that he may do without suit, and the act is legal.

A person of non-age may choose a guardian in England at the age of fourteen in males, and twelve in females. The same rule prevails, by statute, in Ohio.

Persons of non-age may dispose of personal property *by will*, at fourteen in males, and twelve in females.

SECTION V.

(314) Under the head of the disabilities of *non-age*, arises the question, what is the *legal character of the contracts* made by persons of non-age? Are they wholly void, of no obligation whatever? Those contracts, we have already said, which are made for *necessaries strictly*, and which there is no parent or guardian to supply, are *valid;* but what is the character of other contracts made by infants? The law books have,

[1] 2 Kent's Comm. 242.

on this subject, made a distinction. One class of contracts made by persons of non-age are declared absolutely *void;* that is, they have no legal existence. Another class of contracts made by infants are said to be *voidable.* The meaning of this term is, that the infant can on arriving at age *make them void,* by denying and disaffirming them; but if he does not choose to do this, they will be valid. The courts are inclined to construe all contracts made by infants, as *voidable* only, if they can. The reason is, that if it be absolutely void, it does not bind the other party; but if it be merely *voidable,* then it does bind the other party till the infant, on coming of legal age, disaffirms it. The principle on which the distinction is made is, that when any *apparent benefit,* or semblance of benefit accrues to the infant, the contract is only voidable; but if there is no apparent benefit to him, then the contract will be void.

Marriage settlement contracts, made by persons under age, with the consent of parents or guardians, will be enforced, by a court of chancery; for the marriage contract itself would be enforced; and the accessory follows the principal.

A woman under age, may bar her right of dower, by accepting a settlement in the way of jointure.[1] But no marriage settlement of either male or female will be enforced, unless it was fair and reasonable, and for adequate consideration.

(315) Again, a person of non-age may bind real es-

[1] Gould's Lectures.

tate by will, bequeathing it to pay debts, and he may ratify the contracts made by him during infancy.

A contract made for a minor, by one having no authority, may be ratified by her when she comes to full age. As, for example, if the mother of Mary and Jane when they are under age should rent their lands for forty years, they will, by receiving the rents, ratify their mother's contract and make it their own.

(316) A minor may will *personal estate*, at fourteen years of age if a male, or twelve if a female.

SECTION VI.

(317) The next question is, *What are the duties of parents towards children?* The legal duties of parents to children are in fact the natural duties, and they are the plainest and strongest of all the animal instincts. The birds, whom we see in the spring making their nest in the garden tree, when their young are brought forth, first *feed* them; then *protect* them from the hawk and other robbers of the animal creation; and then *teach* them how to fly and how to maintain themselves. This is a summary of the duties of parents towards children. Their legal duties are defined to be, 1. Maintenance. 2. Protection, and 3. Education. Of *maintenance*, the reason and the rule are very simple. Those who give life ought to sustain it; and this duty is reciprocal. In this duty, and that of education, the mother and the father are equally bound. In the beginning of life, it is the mother who does nearly all

for the maintenance of the child; but when it grows up, it is chiefly the labor or the property of the father which is required for this purpose. In regard to young children, of too tender an age to support themselves, the duty of maintenance is imperative, and extends to grand-parents as well as parents. The law requires, that all persons who are poor, impotent or unable through want of understanding, age or infirmity to support themselves, shall be supported by their parents or grand-parents if of sufficient ability. But parents or grand-parents are not bound to support their *grown up* or able bodied children, if they can support themselves.[1] The *public* are not bound to furnish support for poor children, if their parents or grand-parents are able to support them.

The duty of maintaining children does not prevent the parent from disinheriting them by will; he having the absolute power to dispose of his property, by will, as he pleases.

The term *maintenance* signifies the necessaries of life, food, clothing, lodging, and medical attendance, and for these the parent is responsible, although he may not have ordered them; for necessity requires the child should have them.

2. *Protection* also is a duty, but it is not one which the law *enforces;* for it is well known that parents are quick enough to interfere for their children. The law, therefore, *permits* rather than enforces protection. The parent may carry on a lawsuit for the child, or use

[1] Gould's Lectures.

as much force in its defence as the child would have been authorized to do, had it the power.

3. *Education* is considered in reference to either social or moral relations, one of the highest and most sacred duties which a parent owes to children or society. Strange to say, it is one which, while it yields more direct profit than any other, is, notwithstanding, generally the most neglected. In England, as in many countries of the world, there is no general provision made for the education of children. In many States of the American Union, no provision, or none that is practically beneficial, is made for the education of children. This is specially the case with the slave States, where intellectual culture seems totally to fail, except in Colleges and Female Academies. For general education there is no provision. In the New England States, in N. York and in Ohio, there is a general Common School System. Education, to some degree, is accessible to every child, and the effects of the system are unquestionably visible in the more active minds and general intelligence of the people of those States. It is devoutly to be hoped that the time is not far distant, when, at least, a good, plain American education shall be given to every child in our country.

In the mean time, there is one duty to which every liberal and Christian mind should turn its attention. This is the Education of Mothers. Why of mothers? Because they are the real educators of the people in those things, which are most *impressive and important.* It is a true saying, and worthy of memory,

that *just as the twig is bent the tree is inclined.* But *who* bends the twig? For many and the most important purposes, *the mother* bends it. To understand this, we must recollect, that *acquisition* in knowledge and *education* are not equivalent terms. Education includes many things not included in knowledge. All the early *prejudices,* or pre-sentiments and pre-impressions of the relations, actions and events of human life belong to education, and they are chiefly impressed by the mother. All the *principles,* or permanent ideas of the effects of certain conduct are laid very early in life and very often, by the mother alone. The idea of *personal responsibilities* for moral decisions, the dignity or value of religious truth, idea of veneration for God, law and authority; in fine, all that indefinable mass of sentiments, feelings, principles and ideas which constitute our permanent views of human life, of moral action and of religious obligation, belong to the education of early youth, and are, in four cases out of five, influenced by the mother. It is true, that there are many cases in which they are counteracted, if not destroyed by other influences in after life; and it is also true, that the reason may be so successfully cultivated that it weighs causes and consequences calmly, and judges rightly, independently of all these early prejudices, sentiments, principles and ideas. But neither of these classes contains the majority of minds. *They* are, at least, in their moral and intellectual relations, in the channel where their early education placed them. This, then, is why *mothers* are to so great an extent

the educators of mankind. To their daughters, they are almost wholly so. To their sons they give the earliest impressions.

To have mothers, then, *rightly educated*, is one of the main things for the elevation, happiness and permanent prosperity of the people. The next question is, *what* is a right education? Many persons would reply to this, by enumerating numerous branches of useful knowledge and many elegant accomplishments. These may all be right. But the main thing in determining which of these to select is to understand clearly what *effects are intended to be produced.* The intellect is an instrument of vast flexibility, and the spirit is capacious of magnitudes and acquisitions, beyond any limits of knowledge yet attained, or any flight of imagination yet attempted. What then are the great objects to be attained in exercising its powers? The chief ones are, 1. To give the greatest possible strength to the intellectual powers, and 2. The greatest possible development to the good affections. Strength and goodness united make up the elements of attainable power on earth. It is plain, that to attain these, two things are necessary, 1. That women should be taught to think; and 2. That they should be taught to think *rightly.* This again requires that they should be exercised in their scholastic education, more in the study of principles than they have heretofore been; that the mind should be taught to inquire and reason; and finally that it should be grounded on the solid foundation of the Christian religion. Men sometimes display a good

deal of wit, ability and knowledge, with very little moral principle; but for a woman to have such a character, would be an anomaly in social life, and certainly as pernicious in example, as it would be singular in fact. It is rather *weakness* than error, which has been the characteristic defect of female education. Most young women have considered their studies finished, when their brothers have just entered upon the most valuable part of theirs. The consequence has been, that their minds have been left in an *unfinished* state. Some parts have been left very weak, some defective, and no small share of irregularity in the whole. This difficulty can only be remedied by lengthening a year or two, the time of young women's education, and using that in solid and logical studies. If to that were added some practical instructions in the actual economy of life, certainly women would come upon the stage of the world better prepared for its duties. One thing we may say, in conclusion, that an education thorough, solid and Christian, is necessary for American women, necessary for their own happiness, necessary for their country, and necessary for the permanent elevation of the human race.

SECTION VII.

(318) Our next inquiry is, *in whom does the right of custody over a child rest?* It is evident there may be four conditions of a family, each of which will require a different answer to this question. 1. Both pa-

rents may be alive and living harmoniously together. 2. One or both the parents may be insane. 3. The parents may be alive and either partially or totally divorced. 4. The parents may be dead.

1. When both parents are alive and dwelling together harmoniously, the case presents no serious difficulty. The *legal custody* of the children belongs, by law, to the father[1] as head of the family; but where the father and mother and family dwell together, the custody of the children is not separated by either father or mother. It is exercised by both, and all dwell together.

(319) 2. In case of *insanity*, there is little difficulty; for if the father be insane, the entire custody of the children devolves on the mother. If she, or his other friends choose, they can have him secured in an insane asylum or other place of retreat. The whole care of the children, of course, devolves on the mother. If the mother be insane, the whole care, even of infant children, remains with the father.

(320) 3. The third case presents the one in which there is much division of opinion, and in which it is almost impossible to lay down any general rule. It is perhaps well, that in cases of divorce, children are not so easily disposed of, as to make the way to such a result pleasant. It is almost impossible to eradicate from the human heart those natural yearnings, which bind the parent to the children. Hence, some who perhaps would have the matrimonial bonds shaken off, have

[1] 1 Blackst. 453.

been content, patiently to endure them rather than resort to the greater evil of separating from their children.

Divorce, we have seen, is either partial or total. If it be total, the bond of marriage is forever dissolved. If partial, it is a legal separation. In either case, it is a separation; and if there be children, they must remain with one or the other of the parents. Generally, the court, in granting a divorce, determine the question according to their discretion. At least, they may do so. In such cases, it would be perfectly safe to say, that justice requires they should be given to the party who was *not the faulty cause.* For it certainly would be a hard rule, that one whose guilt has occasioned the misery of a divorce should also be allowed to deprive the other parent of the children. If the children are tender infants, requiring the care of the mother for nutriment and attention, unquestionably the mother must retain the custody of them, at least, to such an age, that her assistance is no longer necessary to them.

If there be a legal separation of the parents and there be neither agreement, nor order of court, giving the custody of the children to either parent, then the *right to the custody of the children* (except for the nutriment of infant children) *belongs legally to the father.* However hardly this might operate in some cases, it is the *rule of law.* If Jane Johnson, for example, were to be divorced from her husband William Johnson, he being also the *guilty cause of divorce,* and she should have two minor daughters, it certainly would

be little short of barbarism, as well as a most unreasonable principle, that the custody of these daughters should go to that father. The rule of law, however, is arbitrary, and it is to be feared, has often worked consequences as unreasonable as that. Modern opinions in our country, seem, however, to hesitate in such extreme cases, and in fact to incline the other way. In the case of Barry against Mercein, the right of a father to the custody of his infant daughter, (when separated from the mother), was fully discussed in all the courts of N. York, and in the district court of the United States. The decision was a very remarkable one, and therefore we shall recite the substance of the case.

(321) John A. Barry, in 1835, married Eliza Anna Mercein,[1] daughter of Thomas R. Mercein of N. York. He moved with her to Nova Scotia, where after remaining about a year, he returned to N. York, and in 1838, went again to Nova Scotia, leaving his wife and two children with her father. After this, she refused to return to Nova Scotia. He then permitted her to remain with her father, and retain their daughter Mary till 1839. He then attempted to induce his wife to return with him to his home, and failed. After that, he formally demanded his daughter, and the demand was refused. He stated his ability to support his daughter comfortably, affirmed that she was a British subject, and appealed, by writ of Habeas Corpus, to the judgment of the courts. The case was argued before five different courts, with different decisions. Two of the circuit judges of N. York, and the chancellor of

[1] Law Reporter, December, 1844.

the State, allowed the writ of Habeas Corpus and heard the case, but decided that *the father was not entitled to the custody of the child.*[1] It was then carried to the supreme court, who, in two solemn decisions decided, that the father *was entitled to the custody of an infant child.*[2] The case was then appealed to the N. York court of errors (composed of the senate of the State, the judge and chancellor), and the court of errors *reversed* the decision of the supreme court, deciding, that *the father had not the right of custody.*[3] The case was again tried before the district court of the United States for N. York, on a petition for a writ of Habeas Corpus. This court again decided *against the father,*[4] on the ground that the N. York court of errors had already laid down the rule for the case, and the United States courts would not disturb the decision.

This discussion lasted four years. When it commenced the child was three years old, and when it closed she was seven years old. This case was most elaborately discussed, and the decision, we may presume, will stand. It goes very far to unsettle and over-rule what had been received, as the established rule of law, giving the custody of children to the father. It was a stronger case than that of divorce would be in favor of the mother, for it seems that Mrs. Barry withdrew her society voluntarily and purposely from her husband, refusing to go with him. The child, at the two last de-

[1] 8 Page's N. Y. Reports, 49. [2] 25 Wendell, 80. 3 Hill, 405.
[3] 25 Wendell, 106. [4] Law Reporter, December, 1844, p. 376.

cisions, was not so young as to need the care of the mother. It would seem, then, most probable, that where the mother *was not morally guilty*, and a separation took place between the parents, the courts of law would go almost, if not entirely, the length of giving the entire custody of *daughters* to the mother.

(322) There is another case, in which the father may be deprived of the custody of his children. This is, when he has become so *morally debased* as to be incapable of taking that moral charge of them, which society demands of its members. In this instance, the *court of chancery* (which in some form exists in every State), will interfere and take the custody of the child, or children from the father. This also is a modern decision. It was affirmed by the British House of Lords in the case of the *Duke of Beaufort* in 1828. It was placed on the ground, that the *character and immoral conduct of the father* rendered him unfit to take care of the children.[1] In some two or three States there are statute laws by which a man, who by drunkenness, or other moral misdemeanor, has unqualified himself to be a correct moral agent, may be placed under *conservators*, in which case his children and property will be taken from his custody. This, however, is not the law of most of the States. But it is presumed that the jurisdiction of the courts of chancery will reach the case, and should it be satisfactorily proved, that a man pursues such grossly immoral conduct as to be unfit to bring up children properly, the courts of chancery will

[1] 2 Kent's Comm. 221.

appoint another guardian for them. It is at least certain, that any other course would be inconsistent with the policy of society prohibiting and punishing immoralities; for what more certain method of increasing and encouraging immorality, than to leave children in the care of those morally incompetent to take care of them?

SECTION VIII.

(323) *What are the duties of children to parents?* The natural duties and the religious duties of children to their parents are obvious. They both agree, that to those who have given life, nutriment and education, there is due, in all their fullness, love, honor and obedience. It is only in savage life, and savage life attended by all the horrors of heathenism, that this great law of nature is often violated. There the cruel neglect of the aged, and the equally cruel neglect and destruction of infants, show to what depths of degradation, ignorance and paganism can reduce the human mind and human conduct!

The only rule the law lays down to regulate the conduct of children towards their parents, is that their duties *are reciprocal.* As the parent has the power of command and of service, so the child is bound to render obedience and service. So also, as the parent is bound to support the child, the child is also bound to support the parent.[1] In England the statute law re-

[1] 1 Blackstone.

quires that a man should maintain both his parents and grand-parents. It is probable, that if such a case should come before them, our courts would decide the same thing.

SECTION IX.

(324) *What are the rights of society over the custody and education of orphans?* In every civilized society, the law has provided for orphans in some way. The reason of this is *simply necessity;* for it is obvious enough, that those of tender years cannot take care of themselves, and therefore, if society makes no provision for them, they must either depend on private charity, or perish in the highways. The first cannot always be relied on, and the last would only prove that people to have neither religion nor humanity.

Some provision we presume is made, by statute law, in every State, for the care of orphans who have neither age nor means to take care of themselves. When the parents are dead, and the support of children devolves upon the public, the public, by that obligation, acquire also a power of guardianship over them.

As the laws of the different States are probably very similar, in this respect, we shall give an abstract of the provisions made in Ohio.

1. The trustees of townships have jurisdiction over orphan children; children who are destitute, and children whose parents refuse to provide for them.[1]

[1] Ohio Revised Statutes of 1841.

2. The children of Shakers or other sects, who inculcate *celibacy* as a rule of life, are considered orphans. If the father join the Shakers, the mother has the care of them; but the court may direct a guardian to be appointed.

3. The township trustees may bind out, as apprentices, or otherwise provide for these orphan or destitute children.

4. The board of directors of the county poor-house, where such a one has been formed, have power to bind out to apprenticeship, all such poor children as belong to such poor-house; males until the age of twenty-one and females until the age of eighteen years, in the same manner that trustees of townships are authorized to do.

By these provisions, it will be seen, that in Ohio, orphan children are never without a guardian and a provision for their support. Some similar provisions probably exist in all the States. Where they do not, they ought to be made.

The State of Ohio has provided laws, by which *no child in the State can be without a provision for its support, a guardian and a school.* There are probably few communities of which this can be said.

CHAPTER VI.

LAW OF GUARDIAN AND WARD.

(325) A GUARDIAN is defined to be one who, by law, stands *in the place of a parent.* A WARD is one who is under legal age in charge of such guardian.

The ancient common law of England provided for several kinds of guardians, guided chiefly by the principles of the feudal system. Most of these rules and principles have been repealed by the change in the usages of society and the statute law of the legislatures; but we will state briefly what are now the legal principles which govern the relation of guardian and ward.

1. The first kind of guardian is the GUARDIAN BY NATURE. This is the father, first; and, on his death, the mother. The guardianship, by nature, extends only to the custody of the person. That is, if there be real estate vested in a minor, that remains so vested. In regard to personal property, as rents, etc., the father or mother acquire no actual property in it. They will be bound to account to a court of chancery for all the property they receive, and the use made of it; although there is no doubt, that these natural guardians are bound to take good care of all the property of their children, and that the law will allow a liberal use of it.

We have already mentioned, that the court of chancery has the power to control the custody of children;

and that in cases of extreme immoral conduct on the part of the father, it will interfere.[1]

2. Guardians by will. The father has, by the English statute of Charles II, a right to appoint a guardian, by will, to his minor children. He may appoint this guardian, whether he is himself of age or not; and whether the child is yet born or not. This guardian, too, may control both the person and the property of the child. It supersedes all other kinds of guardian, till the child becomes of legal age.[2] In fine, the law gives the father the power to control his child, and his estate after his death, in the same manner he would have done when living, till the child comes of age.

This guardianship by will, being a *trust*, cannot be assigned. In fact, it is a general rule of law, that *no trusts* can be assigned; because they are *fiduciary*, they are personal trusts; and when they are once assigned, this *personal relationship* between the trustor and trustee no longer exists. It is not what one meant to do, or the other received.

(326) The statute laws of the several States have generally enacted the same rule on this subject as the English law; and, in some instances, extended the right of making guardians by will to the mother. Indeed, it is a reasonable presumption that the mother, being a widow and a guardian by nature, has a right, by implication, to do what she would have been able to do when alive, to direct the management of her property and her minor children.

In Ohio, the statute is full and complete on this sub-

[1] 10 Vezey's Reports, 52. [2] 2 Kent's Comm. 224.

ject. It gives "every father" a power, by his last will, "in writing," to appoint a guardian for one or more of his children, whether they be born at the time of making the will or not, to continue during the minority or for a less time.[1] As the power to make a will is, by the same statute, conveyed upon women, married and unmarried; it would seem to follow that a widow, having children, might appoint a guardian for them, by will.

In *Massachusetts*, the same law as the English rule prevails also, by statute; except that it is declared, by statute, that the *marriage* of a female guardian extinguished her authority as a guardian. The reason for this, we suppose, is that she is supposed to have merged her authority in her husband; and guardianship being a personal trust, cannot be transferred.

In New York, Virginia, New Jersey and Pennsylvania, the power of the father to appoint a guardian, by will, is also enacted. So also in Alabama, with some modifications.

The statute of Illinois gives the power to the mother also, if she be sole, and the father has made no such disposition.

The court of chancery will exert its power to prevent an *abuse of power* by these testamentary guardians. Therefore, should such an abuse take place, the court of chancery will appoint a new guardian.[2]

3. Chancery guardians are guardians appointed by the court of chancery; or, in some States, by other courts having chancery powers. These guardians are

[1] Ohio Statute of Wills.

[2] 2 Kent's Comm. 226.

appointed in place of the guardians formerly appointed, under the feudal system, to take care of the property of the ward. Where there are regular chancery courts (unless the constitution or statutes of a State forbid such appointments), this would seem to be one of the duties devolved on that court by the common law. But in several States of the American Union, this power is given to certain courts and officers by the legislature. In Massachusetts, Connecticut and some other States, this power belongs to what are called *probate courts*. In New York, guardians are appointed by the court of chancery or by the surrogates. In Pennsylvania this power belongs to the orphans' court; and in New Jersey, also, to orphans' courts or surrogates. In Ohio, all powers of this nature are, by statute, placed in the court of common pleas.

The statute of Ohio gives power to the courts of common pleas, "whenever they consider it necessary," to appoint guardians and to give them authority to sell property, real or personal, to pay debts, support minor children, and to do whatever may be necessary in the premises. To secure the wards, the guardian must give bonds for the faithful performance of his trust, etc. Minors living out of the State, but owning lands within the State, may have the benefit of this rule, provided their guardians give bond.[1]

(327) 4. GUARDIANS BY ELECTION. The statute of Ohio provides, that when *minors above fourteen or females above twelve years of age*, or when any minors for whom the court has appointed guardians, shall ar-

[1] Ohio Revised Statutes—Guardian.

rive at those ages, such minors may severally *choose* such guardian as the court may approve; but if they do not so come before the court, one will be appointed by the court for them.[1] This rule prevails also in New York and Connecticut.[2]

(328) 5. There is another species of guardian, which however is unimportant. This is the *guardian ad litera;* that is, a guardian to prosecute a suit or to defend one. This, however, is only *special* to that particular case; and as the court may always appoint one at a moment, and as his powers are merely nominal, this is rather a theoretical than a practical part of the law.

Powers of a Guardian.

(329) The powers of a guardian who is appointed without restriction, are similar, in many respects, to those of a parent; but they are not quite so broad, and there is this important difference, that the conduct of the parent is not inquired into, unless his authority is greatly abused. The conduct of a guardian, however, whether in regard to property or person, is constantly inquired into by the court, and to that he is always responsible.

1. The guardian has control over the minor's person so far as is necessary to the purposes of education and maintenance; for these, with the care of his property, are the great objects for which a guardian is appointed. A guardian may, therefore, change the *domicile* of the ward.[3]

[1] Ohio Revised Statutes—Guardian. [2] 2 Kent's Comm. 227.
[3] 5 Pickering's Reports, 20.

The authority of the guardian is, however, strictly *local.* It cannot, therefore, be exercised in any State but that in which the guardian is appointed.

(330) 2. The guardian has power over the ward's estate, for the purpose of *preserving, using and taking care of it*, for the best interests of his ward; but no guardian has any power beyond that. The *title* to land or other property is not vested in the guardian. It remains, by inheritance, in the minor;[1] but he may make leases during the minority of the minor, but for no longer.[2] He cannot sell without the authority of the court. If the guardian received power to sell, at his appointment, he may do it; but otherwise he must apply to the court for power, without which he will not be allowed to do it.

(331) 3. In personal estate, the rule is the same. If the guardian were to sell personal property fairly, the sale would probably be good; but an order had better be procured, and at any rate the guardian will be held to strict accountability for the proceeds.

(332) 4. The duty of a guardian is that of a TRUSTEE in place of the parent; and for that purpose he is held to account for everything done; on the score of duty, in the first place, and as a trustee for property in his disposition of it.[3]

A guardian is therefore bound by one general principle in his conduct towards the property of his ward; that is, *he is bound to use the ward's property to the best advantage, and to make no profit of it himself.* If he were to purchase a debt of the ward's at a dis-

[1] 2 Kent's Comm. 228. [2] Idem. [3] Idem. 230.

count, the profit must go to the ward, not himself. If he makes a good bargain with the ward's property, he must account for it to the ward. He must prevent any waste or damage to the ward's real estate. He must rent it for the highest price and keep it in good repair.

(333) If a guardian lose the ward's money by negligence, he must account for it out of his own pocket. He cannot buy land with the minor's money, without an order of court. He must not allow the ward's money to lie idle without interest.[1]

(334) In fine, a guardian, in whatever way appointed, is a TRUSTEE IN THE PARENT'S PLACE; who is bound to act for the ward, both as to person and property, as a parent would have done. For this, the courts of justice will hold him to the strictest accountability. It is the duty of a guardian to take care of the ward's property and use it only to *maintain and educate the ward.*

Emancipation.

(335) 1. Emancipation takes place, in the first instance, by the minor arriving *at full age;* for that terminates *legal infancy.*

2. An infant or minor is emancipated by *marriage;* because that relation is inconsistent with his remaining in a subordinate station in his father's family, and he becomes necessarily free from his control, and is emancipated. So also of a daughter, who must henceforth be under the control of her husband.

3. A *legal infant* may be emancipated by his gaining a legal *settlement of his own;* as he does, for example,

[1] 2 Kent's Comm. 230.

by apprenticeship; for he has ceased to be his father's servant. He takes a new settlement with his new master, and is emancipated in respect to his father.

4. An infant or minor is emancipated, generally, by contracting any relation inconsistent with his remaining in a subordinate station in his father's family; as, for example, in England, by enlisting as a soldier.

The *principle* on which a minor is held to be a servant of his father is, that he remains under the domestic government and in the service of his father. When he contracts any relation by which he ceases to be under the government and control of his father, he is emancipated by the law.

CHAPTER VII.

LAW OF MASTER AND SERVANT.

(336) Since the earliest ages of mankind, the relation known as that of master and servant has existed. It grows out of the mutual necessities and dependencies of society. One person wants a piece of work done which he is unable to do himself, and he has the means to reward another for doing it. Another depends on his daily labor for support, and is willing to do this work for a fair compensation. One employs, and the other is employed. The relation between them, whether it continues for an hour, a day, or a week, is the relation of *master and servant*. Again, the service which was wanted, at first, for a short time and a particular occasion, is at last wanted continuously; and the employed is hired by the employer for a length of time specifically contracted for. Again, a person agrees to hire himself or is hired, being a minor, by his guardians, for a certain term of years, and the agreement is placed in the form of a written contract or indenture. This is another form of master and servant called *apprenticeship*. Again, by the usages of barbarous nations, the prisoners of war are the property of the captors, and they thus become *slaves*.

In the various forms of this relation, there is one leading distinction. In all forms of service based on

contract, the service is *voluntary*. In all forms of service created by the laws, whether of war in barbarous nations, or of the municipal code in some of the States of the United States, the service is *involuntary*. The first, then, is free labor; and whatever may be the terms of the contract or the nature of the service, is based on justice, and is equitable and fair as any of the arrangements of human society can be. Involuntary service is slavery; and not being based on the original consent, can never carry with it the sentiment of natural justice.

There is another distinction in the modes by which this relation is constituted. This relates to time. Indentures of apprenticeship are for a term of years, and are fixed and irrepealable in their nature. This, therefore, is a species of servitude more permanent and binding than that of daily and contingent labor.

There is still another distinction founded on the nature of the service. For example, an agent or broker of any kind is, for the purpose of the business for which he is engaged, a servant; though it is true he is not a servant of the kind we are about to speak of. He is known by the name of *agent*. There are a large class of servants known as *journeymen*. Their service is generally performed by the piece. Then there are *day laborers*, who hire themselves by the day. Lastly, there are *menial servants*.

This last distinction, founded on the *nature of the service*, is that which seems to have shaped the popular ideas in regard to servants. Servitude is almost by all regarded as degrading. This cannot arise from the mere

relation of employer and employed; because, that relation exists among all ranks and conditions of society. The degradation attached to servitude has arisen from two facts. First, because the earliest and a large proportion of all the servants of the world have been slaves; and secondly, because a large class of servants are employed on small household affairs; which, being the lowest in intellectual rank, are deemed mean in their kind. It is the nature of the service performed by the servant, which makes his employment dignified or degrading. Cooks have received, in some instances, salaries much greater than those which have rewarded the highest literary genius; yet nothing could induce mankind to place them in the same rank. The decision, so far as regards the distinction between the intellect and the body, is correct; for, if mankind did not place intellectual service above physical labor, they would have no claim to rank themselves above the brutes. That distinction is immutable in the nature of man; nor, will all the disputations of false philosophy or the zeal of mistaken benevolence avail to break it down.

(337) The relation of master and servant concerns equally men and women. It is precisely the same relation among women as among men. We shall, therefore, lay down the general principles of master and servant, omitting only those parts which relate to commercial agencies, with which women seldom have anything to do. With servants, however, in the household, and on estates, women have more to do than any other class of the community. Women also constitute a large

part of the domestic servants of this country. A great number of women are also employed in factories, bookbinderies, printing offices, and various similar employments. Thousands of others are employed in various kinds of clothes-making, dependent upon their daily labor for their daily bread; and that labor furnished by contract to employers. To this great class of persons, as well as to those who employ them, a knowledge of the laws which govern this relation is very important.

(338) Let us consider now the relation of employer and employed (master and servant) in this order:

1. Who are servants, and what are their duties?

2. How far are masters and servants bound by the acts of one another?

3. How far is the employer bound by the contracts of the servant?

4. What acts they may justify for one another?

SECTION I.

(339) *Who* is a servant? The general definition of a servant is,—"one who is subject to the personal authority of another."[1] This comprehends all those persons who by contract place their personal services at the command of an *employer*. Of course, this includes a vast many more than merely those who are *menial servants*. A man who hires himself by the day, to do the work of another, is such a servant. All that class

[1] Gould's Lectures.

of persons who hire themselves to do housework are servants. All who contract to do service, at the will of another are, in the very nature of things, *servants*. Their contracts make them so.

A *master* is one who exercises the authority which the servant has thus contracted to give his employer over his services.

This relationship exists *by contract*, in all cases except those of slaves. The class of persons whose legal condition we are about to discuss, are menial servants, apprentices, and day laborers.

(340) The duties of a servant, or one employed, towards the employer, are comprehended in a single sentence,—*to fulfil perfectly and justly the service they have contracted to perform.* It does not extend beyond this; but this in the United States is very often neglected. The first requisite for any one to perform fully and truly, services which they have contracted to give, is to understand the *obligation of a contract.* The contract to perform the service, is certainly as obligatory as that to pay the money stipulated for its performance.

(341) *Menial* servants are called so, because they are employed within the *walls.* In other words, they are house servants. This is the most numerous class, and are those specially known as such, in the United States. There are three legal rules only which relate to this class of servants, which are of any practical importance. 1. If a servant, hired for a definite term, *leaves the service before the end of it, or is dismissed*

for such misconduct as justifies it, he or she loses the right to wages for the period he has served.[1] So a person hired by the year, *cannot quit the service* without forfeiting his salary; nor can he be dismissed without cause and deprived of it. 2. A servant, so hired, may be dismissed by the master before the expiration of the term, either for *immoral conduct, wilful disobedience, or habitual neglect.* The statement of this rule is enough to show also, that in the relation of personal service, the law regards *obedience* to the reasonable demands of the employer, as an essential requisite to the service. 3. When the servant is a *minor*, the employer or master has a right to give the servant *personal chastisement*,[2] provided it is reasonable; for such servant is, for the time being, in the condition of a child or ward. But this right does not exist, when the servant is of full age. But when the servant is a minor, and the chastisement is only reasonable, the master, or mistress can *justify* the chastisement, should an action for assault be brought against them. This is a rule absolutely necessary in the case of children and youth, often employed, in this country, as house servants. So also, if the master sends his servant to school, the schoolmaster may correct him. This is necessary to the government of the school.

(342) There is another rule of some importance to masters, relating to the conduct of third persons. If a third person *entice away* a servant, within the time for which he was engaged, the employer may have an ac-

[1] 2 Kent's Comm. 258.

[2] Gould's Lectures.

tion for damages against him. It is a legal wrong, as well as a great breach of the comity of life to entice away the servants of others.

(343) The case of *day laborers* differs from that of house servants only in this, that they are not members of the family of the employer. Their immediate conduct is not under the care of the master. The only rule to bind them is the terms of the *contract.* As in the case of house servants, if they wilfully go away, before the time of their service is expired, or are discharged for misconduct, they are not entitled to the wages; for the wages are the consideration of services rendered.

(344) *Of apprentices.* This is a peculiar class of servants, which may be defined thus: "Apprentices are those who are bound by articles of agreement, made by their parents, guardians, the overseers of the poor or themselves, to serve a master, in the manner agreed upon, to learn some art, trade or profession."[1] As to this relation, we may inquire first, *who* may create it? The statute of Ohio may be taken as a sample of the general law of apprenticeship; and the persons who may there bind out a minor are, 1. The father of the minor. 2. If the father be dead or unable, the mother or guardian. 3. The trustees of the township, who may bind out a child, who is an orphan or destitute, or whose parents shall not provide for it. 4. The directors of the county poor-house. 5. If a minor should be so alone in the world, as to have neither father, mother nor guardian, and yet have the ability to

[1] 2 Kent's Comm. 261.

be independent of the township trustees, no doubt such a minor might bind himself or herself, so far, that in consideration of covenants performed by the master, the services of the minor could be claimed by the master.

(345) It is said, that the father cannot, by the English law, bind a minor child, without the consent of the child; but in the United States, this is regulated by the statutes of the States.

(346) An apprenticeship can be created only *by deed*;[1] that is, by an agreement called *an indenture.* These articles of indenture must be *written, signed by both parties,* and witnessed in such a manner, as the several State statutes may require.

(347) The act of apprenticeship can only continue till the period of legal age; which is twenty-one in males, and eighteen in females.

(348) The Ohio statute requires, that the indentures be recorded, within three months of the execution thereof; and if it be not, the instrument is void.

(349) It is the duty of the parents, guardians or township trustees to inquire into the condition of the apprentice and to defend such minor from cruelty, neglect or any breach of covenant; and for this purpose, they can bring suit, before a justice of the peace, for any such misconduct on the part of the master or mistress.

(350) The statute of Ohio, in regard to apprentices, contains some very humane provisions. The master

[1] 2 Kent's Comm. 263.

or mistress is bound to give the apprentice the rudiments of a common education. They are bound to teach the minor *reading, writing and the ground rules of arithmetic.* When the term of service is expired, the master or mistress is bound to give the apprentice *a Bible, and two suits of common wearing apparel;* and likewise give or secure to him, any money or property secured to be paid.

(351) There is another provision of some consequence to third persons. Any persons, who counsel, assist or entice an apprentice to run away, or leave the master or mistress, are liable to a penalty, collectible before a justice of the peace.

(352) In Massachusetts, as in Ohio, the father may bind his minor child at common law, without the statute. But this is denied in Pennsylvania and N. York. But it would seem, that in the very nature of things, the father, and on his death, the mother or guardian had such power. It is a power, essential oftentimes, in order to make the best disposition of the child.

(353) The master or mistress is entitled to the wages, and the fruits of the personal labor of the apprentice while the apprenticeship continues; and is entitled to them, even when the apprentice works for another and in a different business from that to which he was apprenticed.[1]

The death of the master or mistress, dissolves the apprenticeship; for it is a *personal trust*, which ends with the life of the person to whom it was intrusted.[2]

[1] 2 Kent's Comm. 265. [2] Idem.

The executor or administrator cannot take the apprentice ; but is liable for such of the covenants of apprenticeship, as may be *necessary* for the maintenance of the apprentice.

(354) It will be observed here, that all the rules in regard to apprentices, are as applicable to the case of *women* holding that relation either as mistress or apprentice, as they are to masters. The professions of *milliner, mantua-maker,* and several others employ a large number of girls who either stand in the relation of apprentices or of professional servants. The relation is one of *trust.* The mistress is bound to furnish these girls with sufficient clothing, proper food and the common instruction of an English education. For this, she is entitled to the full services and wages of the girls employed. If the contract be one of special apprenticeship to a particular trade, the mistress is bound to teach that trade and to teach it properly. Not only this, but the mistress is bound to teach these girls *sound morals, and preserve them from any of those immoralities and temptations,* which so often lead apprentices astray. Indeed, we may affirm, that if the morals and principles of apprentices, male and female, in our large cities, could be preserved sound and pure, a very large portion of the vice and crime peculiar to cities would have no existence.

The law imposes upon guardians and masters and mistresses the duty of providing for the minors committed to their charge, and of inculcating sound morals.

To enforce this, the courts of chancery have jurisdiction, and may interpose their authority when the facts are brought before them.

SECTION II.

(355) The next question is, *How far are master and servant bound by the acts of one another?*

Those acts of the servant which are *done by the command, expressed or implied*, of the master or mistress, *are the acts of the master or mistress*;[1] for the law says, in one of its maxims, "He who acts through another, acts himself."

This is the general principle. Regularly, it is said, all acts done by the servant, *in the routine of the business* in which he is employed, are deemed the acts of the master or mistress. 1. All acts done by the express command of the master. 2. Whatever the master expressly permits the servant to do; and 3. Whatever is done under a general scope of business, or a discretionary power, are deemed acts of the master.[2]

(356) If a servant, by command of his master, do any unlawful or wrong act, both the servant and the master are liable to an action for it. The servant is liable, because he is not bound to do an unlawful act; and the master is liable, because the servant acted by his command.[3]

(357) Those acts of the servant, which are *not* done by the express or implied command of the mas-

[1] 1 Blackst. Comm. 429. [2] Gould's Lectures. [3] Idem.

ter, are not deemed the acts of the master. If, for example, a house-servant, not acting with the authority of the master or mistress, and not in the pursuit of his regular business, should commit any wrong act, the master is not liable for it. The servant is doing his own voluntary act. So again, if the servant be in pursuit of his regular business, but abandons it for a moment, to commit a wilful injury upon another, the servant alone is answerable for it. If the coachman of a widow lady, for example, driving her carriage, *wilfully* drives against and injures another carriage, she is not answerable for it; for as to a *wilful* act, the servant is not the agent of his mistress.[1]

(358) But if, on the other hand, this coachman had run against the carriage *by negligence*, his mistress would have been liable in damages for the injury done; for she was bound to employ skilful and careful servants. She is an insurer against the want of skill in her servants, but she is not an insurer against their evil passions.

So also, a tavern-keeper is liable for the property of his guests, stolen by his servants; for he is bound by the law to provide honest servants. If a lady, then, put up at a hotel in N. York, and the servants steal her jewels, she can recover the value of them from the landlord.

(359) If a servant employ another servant, to do something in business for his master, and this is in the regular course of business, and the last one employed

[1] 1 East's Rep. 106.

occasions a damage by his negligence, the master of the first is liable for it. This is, because this sub-agency was necessary to the transaction of the business, and all the servants, so employed, are considered as the servants of the first servant's master.

SECTION III.

(360) *How far is the employer liable for the contracts of the servant?* This is a very important question; for in a state of civilization, many families must and do employ servants, and it is important to know how far they have the power to make debts for the family.

A master or mistress is bound, by the contracts of the servant, *whenever the servant acts within the scope of an authority delegated to him by the master;* on the principle before stated, that he who acts by another acts for himself. The authority may be either general or special, express or implied.

(361) A *general contract*, is one not confined to any individual contract, but is one which extends to all contracts, or all of a certain kind. If a widow, for example, in keeping house, should give authority to her servant to go to the stores and purchase necessaries for her, this is a general authority, and she would be liable to the store-keepers for any reasonable amount of goods the servant purchased. Except where the servant is known to be very honest, it is an unsafe practice to give such credit.

So if a master or mistress *usually* or frequently allows the servant to purchase on credit, he thus gives the servant a general authority to purchase on credit.[1] The public have a right to presume that he has permission to purchase on credit. If the master, in one instance, pays for an article purchased by the servant on credit, without expressing any disapprobation, it is equivalent to direction by the master to the servant to purchase on credit in future.

(362) On the other hand, if the master or mistress has made it a practice to send ready money with a servant to purchase necessaries, there is *no* implied authority to purchase on *credit*.

(363) When a master or mistress has permitted a servant to purchase on credit, he may discharge himself in future by *forbidding* those who have trusted the servant from doing it in future. But he cannot discharge himself by any dissolution of the relation between himself and the servant, until it has become public. In all cases where the master has given the servant a credit, the prohibition must be as public as the credit before given. If the servant is authorized to sell certain property, and in selling it makes a warranty, the master is bound by it, unless he was prohibited from making it.

In these rules, *a servant* is any one who acts as an agent for another. A wife, child, relative or any person who is trusted to make purchases for a family, is a servant so far as to bind the head of the family within the meaning of these rules.

[1] 1 Blackst. Comm. 430.

(364) In regard to *the sickness of servants*, it is said that the relation of master and servant does not bind the master or mistress to pay the expenses of the servants' sickness, except in the cases of slaves and apprentices. But we suppose it is the general habit of householders to pay their servants' expenses in case of sickness; at least, we are quite sure it is the dictate of humanity. There may be an exception, in the case of medicine; but other things are usually paid for, by the liberal house-keepers of the United States.

(365) If a servant in performance of his master's business does an injury, through *negligence, ignorance, or want of skill*, the servant as well as the master is liable to the party injured.

(366) Again, the servant is liable to his master for all *wilful wrongs and acts of negligence*, by which the master has suffered. For example, if the coachman of a widow lady should, by his negligence, suffer one of her horses to die, the coachman is liable to her for it.

SECTION IV.

(367) *What acts may a master or servant justify for one another?*

1. A servant may justify an assault in defence of his master, and may do precisely the same as what his master might have done. This he is allowed to do from the favor which the law shows to this relation. But strange to say, the law will not allow him to justify an assault in favor of his master's wife, children or goods!

Servants may be chastised by a Master.

This is a preposterous rule; for a man regards his wife and children as part of himself, and they all constitute but one family.

2. So also the master can justify an assault in favor of his servant, on the same principle.

(368) The master may *chastise* a domestic servant, but no other. This chastisement must be moderate and reasonable. A household servant stands in the same relation, as to obedience and government, as a child or minor ward. They are all supposed to be members of a family, and to be under the government and guidance of the head of the family.

A master cannot delegate his right of correction to another; for these trusts are *fiduciary*. But if the master sends his servant to school, the school master may correct him.

If a servant be beaten by another person, the master as well as the servant may have an action for damages.

In all the rules laid down under this and other chapters of this work, it will be observed that they apply as well to WOMEN as to men, except in those cases where it is expressly stated to the contrary.

We have now discussed the chief topics and legal principles which concern the condition of women, as members of civil society. They are those which regard them in the relations of a CITIZEN, a CHILD, a WIFE, a PARENT, and the HEAD OF A HOUSEHOLD. If any useful intelligence has been communicated to any minds,

the object of this work is accomplished. If it awakes any inquiry or study in relation to the great philosophy of civil society, it will have done some good for the republic. If it has informed the women of the nation upon their rights and duties peculiar to themselves, it will have done no small service to them. In the hope that some or all of these ends have been attained, we bid farewell to our readers, and commend these labors to their kind consideration.

END.